Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

MUSTAFA REDZIC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eight Circuit

PETITION FOR A WRIT OF CERTORARI

MUSTAFA REDZIC
3700 Wright Ave.
Big Springs, TX 79720

QUESTIONS PRESENTED

1. Whether 18 U.S.C. §1346 constitutes a separate offense within 18 U.S.C. §1341 and §1343 by the specification of distinct elements each of which has to be charged by indictment, proven beyond reasonable doubt, and submitted to a jury for its verdict?

2. Whether Driver's Licenses constitute State property valued at $5,000 for purposes of federal bribery statute 18 U.S.C. §666(a)(2) which requires that the subject of the bribe "involve anything of value of $5,000 or more?"

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Eighth Circuit is designated for publication in 627 F.3d 683 (8th Cir. 2010).

JURISDICTION

The date on which United States Court of Appeals decided the case was December 6, 2010. The motion for hearing En Banc was denied on January 13, 2011. App. A.

The jurisdiction of this Court is invoked under 28. U.S.C. §1254(1).

REASONS FOR GRANTING CERTIORARI

Petitioner was indicted and convicted on one count of each, mail and wire fraud, §1341 and §1343 on the theory that he deprived the state of property in form of Commercial Driver's Licenses (CDL). This Court held that "§1341 does not reach false statements made in an application for a state license [because] ... a State's interest in ... licenses is regulatory interest rather than property interest." Cleveland v. United States, 531 U.S. (2000) (reversing Cleveland's fraud conviction noting that there is no assertion that licensing scheme implicates the intangible right of honest services §1346). In Redzic, the Appellate Court affirmed fraud convictions on the honest services theory §1346 even though it was neither alleged, nor argued, nor submitted, holding that "§1346 does not create separate offense; ... it is therefore not necessary to cite it in the charging instrument." This Court held that "where a federal statute is susceptible of two constructions by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, The United States Supreme Court's duty is to adopt the latter." Jones, 526 U.S. Certiorari should be granted in order to properly construe §1346.

Federal bribery statute §666(a)(2) requires that the subject of the bribe "involve anything of value of $5,000 or more." Subject of the bribe is CDL. This Court unanimously rejected the government's theories of property rights involving state licenses "not simply because they stray from traditional concept of property. We reject government's reading

of [the law] as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear language by Congress. Licensing schemes are characterized by [this Court] as exercises of state police power." Cleveland. This court should declare CDL not property for purposes of §666(a)(2).

STATEMENT OF THE CASE

In case No. 09-7560, this Court vacated and remanded for further proceeding in light of Skilling, 561, U.S. __ (2010), the judgment on one count of mail fraud under §1341, one count of wire fraud under §1343, one count of bribery under §666(a)(2), and one conspiracy count under §371 in United States v. Redzic, 569 F.3d 841 (8th Cir. 2009). On remand, Redzic argued that the Appellate Court's holding in present case that "**§1346 does not create a separate offense** [and that] **it is therefore not necessary to cite it the charging instrument**" cannot stand after Skilling. The Supreme Court has ruled in Skilling that the general verdict in his case is tainted because one of the theories, honest services, instructed to the jury was legally erroneous. To salvage the conviction in Skilling, government has to prove beyond reasonable doubt that none of the twelve jurors convicted on honest services. Since honest services does create a separate offense, Redzic argued, and he was never charged with it, his fraud convictions must fail. He also argued that his bribery conviction under §666(a)(2) must fail as well because it rests on the unconstitutional theory of guilt that he bribed another to obtain state property in the form of

Commercial Drivers Licenses (CDL), while CDLs by law are not state property at all. App. B & C. The Appellate Court affirmed convictions on all counts reiterating that "**§1346 does not create a separate substantive offense; it merely defines a term contained in §1341 and §1343. It is therefore not necessary to cite it in the charging instrument.**" Redzic, 627 F.3d 683 (8th Cir. 2010). It affirmed the bribery conviction under §666(a)(2) as well without addressing the petitioner's argument, simply honoring again the stipulation (App. D) where petitioner's attorneys stipulated to the value of CDLs as being in excess of $5,000, even though petitioner had argued that the stipulation at issue constitutes a violation of the law. The court then concluded that "the indictment, the government's case at trial, and the jury instructions were each sufficient to support a conviction for the fraudulent deprivation of honest services through bribery scheme in violation of §1341 and §1343, which falls squarely within even the recently narrowed parameters of §1346."

INDICTMENT

The indictment reads in pertinent part that Redzic bribed another "intending to influence or reward the issuance of drivers' licenses to his clients, said licenses having a value of $5,000 or more **to the State of Missouri**, the defendant and the applicant. In violation of 18 U.S.C. §666(a)(2)." App. E at 4.

Mustafa Redzic

"devised a scheme and artifice to defraud the State of Missouri of money and other things of value

including CDLs by means of the submission of material falsehoods and misrepresentations of material facts through the United States mails, in violation of 18 U.S.C. §1341. " Id at 8-9.

Mustafa Redzic

"devised a scheme and artifice to defraud the State of Missouri of money and other things of value including CDLs by means of the submission of material falsehoods and misrepresentations of material facts through wires, writings, signs and signals transmitted in and affecting interstate commerce." In violation of 18 U.S.C. §1343. Id at 9-10.

TRIAL

In her opening statement to the jury, USA Catherine Hanaway said: "What makes this case a federal instead of a state case is that CDLs ... had a value in excess of $5,000." App. E. During the trial, government never mentioned §1346 or anything about honest services doctrine. At the post-trial motion for acquittal, AUSA Thomas Albus asked the district court to be very specific as to the basis of the ruling if there is a judgment of acquittal, if the court finds that "CDLs are not property under Cleveland; therefore, **what the government charged the defendant with was not a crime, so he cannot be convicted of it**, well, then, we would consider ... charging the scheme to defraud the State of Missouri out of the **right to honest services**. I think you'd get the drift of where I'm going because **we may have to consider additional charges**." App. G.

JURY INSTRUCTIONS

The instructions defined the term "scheme to defraud" as follows: "The phrase 'scheme to defraud' includes any plan or course of action intended to deceive or cheat another out of **property** by employing material falsehoods. It also means the obtaining of **property** from another by means of material false representations or promises." At oral argument in the Appellate Court on direct appeal, government conceded that "the jury had no evidence about the concept of right to honest and faithful services in the indictment or in the instructions." App. H.

ARGUMENT

Honest Services Statute Creates A Separate Offense By The Specification Of Distinct Elements, Each Of Which Has To Be Charged By Indictment, Proven Beyond Reasonable Doubt, And Submitted To A Jury For Its Verdict

On remand, the Appellate Court affirmed its holding (569 F.3d 841) that "**section §1346 does not establish a separate substantive offense; it merely defines a term contained in §1341 and §1343. It is therefore not necessary to cite it in the charging instrument.**" Redzic, 627 F.3d 683 (8th Cir. 2010). Because §1346 does not create a separate offense, the court reasoned, it is "not determinative" that "the prosecutor neglected to use the phrase deprivation of honest services" at trial. Id.

Jury was instructed exclusively on property theory unconstitutional under Cleveland, 531 U.S. (2000). Government admitted "the jury had no evidence about the concept of right to honest services in the indictment or in the instructions." App. H. The court found that "the jury instructions correctly laid out the four elements of mail fraud," and though "the instructions define the term 'to defraud' to 'include any plan or course of action intended to deceive or cheat another out of property by employing material falsehoods,'" the court reasoned that "according to this definition, the phrase 'scheme to defraud' includes plans to deprive another of property but is not necessarily limited to such plans. It would have been preferable had the District Court used the term 'honest services' instead of property, ... but a District Court's instructions will be upheld if, when read as a whole, they fairly and adequately contain the law applicable to the case." 627 F.3d 683. The Court did not even apply Yates (354 U.S.) error analysis to ascertain whether Redzic's fraud convictions rest on unconstitutional theory of guilt that he deprived the State of property in form of CDLs. The Appellate Court just said that "§1346 does not create separate offense" without squarely facing the issue. This is a constitutional question and this Court explained that "constitutional questions are too important to be decided without being squarely faced." Jones v. United States, 526 U.S. 227.

Federal mail fraud statute, §1341, prohibits "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representation, or promises." Honest services doctrine was never part of the statute's

language. It took courts almost a century to develop it, and they did it "emphasizing Congress' disjunctive phrasing." Skilling, 561 U.S. (2010). This Court stopped this development explaining that: "the words 'to defraud' commonly refer to wronging one in his property rights by dishonest methods or schemes, and usually signify the deprivation of something of value by trick, deceit, chicane or overreaching." McNally, 483 U.S. 350. How accurate the Court's laying out the meaning of the words 'to defraud' is best illustrated in this case where, after a three-day presentation of the property theft theory to the jury, government admitted after the trial that the "jury had no concept of the right to honest and faithful services" theory of guilt, The Court specifically held that §1341 "does not refer to the intangible right of the citizenry to good government." Id at 356. Soon after McNally, Congress enacted 18 U.S.C. §1346 which reads: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

As is clear from Congress' language, §1346 does not redefine the words 'to defraud' to mean something they did not mean before. This Section includes, only for purposes of this chapter, only one of many intangible rights, the right of honest services, into the the term 'scheme or artifice to defraud.' This Court never understood that §1346 merely defines a term [to defraud] contained in §1341 and §1343, unanimously holding more than a dozen years after the enactment of the honest services statute that "§1341 does not reach false statements made in an application for a state

license." Cleveland v. United States, 531 U.S. 12 (reversing conviction resting on the theory that Cleveland deprived the state of its property in form of a license). If the Court believed that "§1346 does not create a separate offense" and that it is "therefore not necessary to cite it in the charging instrument," it surely would have affirmed Cleveland's conviction on the ground that he deprived the State of the right to honest services; a doctrine that would have been encompassed by way of §1346 in the term 'to defraud' contained in §1341. The Court noted instead that "there is no assertion that [the State's] licensing scheme implicates the intangible right of honest services." Cleveland at 20. This case is identical: "§1341 does not reach false statements made in an application for a state license," and the government never asserted that the "licensing scheme implicated the intangible right of honest services" until after jury trial. In Skilling, 561 U.S., the government did assert that Mr. Skilling's scheme to defraud implicates the intangible right of honest services. But because the Court found that the honest services theory of guilt was erroneous, it also found that it tainted his whole fraud conviction resting as well on two other, legally valid theories of guilt. In order to salvage Skilling's conviction, the government must prove, beyond reasonable doubt, that none of the twelve jurors convicted relying on honest services theory of guilt. This does not suggest that "§1346 merely defines a term [to defraud] contained in §1341 and §1343." §1346 is a separate offense by the specification of distinct elements. While §1341, standing alone, criminalizes wronging one in his property rights without a bribe being involved, §1346, as construed in Skilling,

criminalizes the denial of the betrayed party's honest services only if that denial arises out of a bribe and kickback, "even if the scheme occasioned a money or property gain for the betrayed party." Section §1346 creates a separate offense because it provides basis for conviction in absence of all other provisions of the mail fraud statute, guaranteeing the application of the maximum statutory punishment. If §1346 does not stand alone, neither does the §1341, which by itself "does not reach false statements made in an application for a state license." Cleveland.

And finally, as illustrated in this case, if §1346 does not create a separate offense, a trial judge is freed from "duty to give instructions that are sufficient to explain the law." Kelly v. South Carolina, 534 U.S. 246. And though the jury instructions were unconstitutional under Cleveland, the Appellate Court held that they "correctly laid out the four elements of mail fraud: (1) devising or participating in a scheme to defraud; (2) intent to defraud; (3) knowledge that it was reasonably foreseeable that the mails would be used; and (4) use of the mails in furtherance of the scheme." But this Court has held that "[i]t is not sufficient for the jury instruction merely to be susceptible to an interpretation that is technically correct. The important question is whether there is a 'reasonable likelihood' that the jury was misled or confused by the instruction, and therefore applied it in a way that violated Constitution." Victor v. Nebraska, 127 LED 2d 583, 511. The unconstitutional instruction in this case categorically vitiates all jury's findings. There is clearly no jury verdict within the meaning of the Federal Constitution's Sixth Amendment guarantee

to an accused of a right to a jury trial in a criminal prosecution in this case, as a direct consequence of the lower court's holding that "§1346 does not create a separate offense." The honest services statute should be construed to constitute a separate offense because:

> where a federal statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, The United States Supreme Court's duty is to adopt the latter. It is out of respect for Congress, which is assumed to legislate in the light of constitutional limitations, that the Court adheres to this principle, which has for so long been applied by the Court that the principle is beyond debate.

Jones v. United States, 526 U.S. 227. The Appellate Court's construction of §1346 does raise a serious constitutional question under the Fifth Amendment's Due Process Clause and the Sixth Amendment's notice and trial guarantees: when a jury determination has not been waived, may judicial fact-finding by a preponderance support the application of the §1346's provision that guarantees the application of the maximum statutory penalty in absence of all other provisions of the statute? This Court foreclosed in Cleveland government's right to claim loss of property when a State license is fraudulently obtained, and "[f]ederal courts lack subject matter jurisdiction when a federal claim ... is foreclosed by prior decisions of this Court." Arthur Anderson LLP v. Carlisle, 129 S. Ct. 1896. When the government belatedly realized that Redzic's

convictions rest on constitutionally invalid ground, it "present[ed] the District Court with valid basis for conviction [under] 18 U.S.C. §1346," (App. I) without any prior notice. The district court then supplemented its finding of guilty under §1346 for the jury's resting on unconstitutional ground, and sent petitioner to prison for 75 months forfeiting his property. The district court and subsequently appellate court relieved the government of its due process burden to prove every element of the crime beyond reasonable doubt. It is therefore no trivial question to ask whether that amounts in recognition of legislative power to authorize determinations on guilt and sentencing without a jury which would invite erosion of the jury's function to a point against which a line must be drawn.

Drivers Licenses Do Not Rank As Property For Purposes Of Federal Bribery Statute Under §666(a)(2)

The manifest purpose of the federal bribery statute §666(a)(2) prohibiting theft or bribery concerning programs receiving federal funds is to safeguard finite federal resources from corruption and to police those with control of federal funds. United States v. Rooney, C.A. 2 (N.Y.) 1994, 37 F.3d 847. Bribery statute was intended to protect integrity of federal funds, and not as general anticorruption statute. United States v. Frega, S.D. Cal 1996, 933 F. Supp. 1536. Congress, in enacting statute which makes it federal offense to corruptly give anything of value to any person, with intent to influence or reward agent of local government, intended to safeguard federal resources from corruption and

police those with control of federal funds. United States v. Bigler, S.C. Fla 1995, 907 F. Supp. 401. 18 U.S.C. §666(a)(2) requires that the subject of the bribe "involve anything of value of $5,000 or more" and that the entity whose property is obtained by fraud receives "benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance."

The subject matter of the bribe in Redzic is Commercial Drivers License (CDL). This Court has held that "a state interest in ... licenses is regulatory interest rather than property interest." Cleveland. "If [defendant] defrauded the state of 'property' [by defrauding it out of licenses], the nature of that property cannot be economic." Id. Government had petitioner's attorneys stipulate to the value of CDL at $5,000 and then said to the jury: "what makes this case a federal instead of a state case is that CDLs ... had a value in excess of $5,000." App. E. But this Court unanimously rejected in Cleveland the government's theories of property rights involving state licenses "not simply because they stray from traditional concept of property. We reject government's reading of [the law] as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear language by Congress. ... Licensing schemes [have been] characterized by the United States Supreme Court as exercises of state police power; the state's authority to select ... licensees rest upon the state's sovereign right to exclude applicants deemed unsuitable to run [certain] operations." Id. Prosecuting licensing fraud under §666(a)(2) "would

subject to federal ... prosecution a wide range of conduct traditionally regulated by state and local authorities." Id. "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." Jones v. United States, 529 U.S. 848. It is clear from the foregoing that CDL does not rank as property valued at $5,000 for purposes of §666(a)(2). This fact makes Redzic's bribery conviction under §666(a)(2) legally baseless.

Petitioner argued in both, District and Appellate Courts that licenses are not state property under Cleveland. Both courts recognized this fact for fraud purposes, but held fast to stipulation for purposes of bribery conviction. The stipulation at issue is not binding to the court. It constitutes a violation of the law. This Court has long held that private parties cannot stipulate on a question of law. See United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc., 508 U.S. 439 (1993) ("After giving the parties ample opportunity to address the issue, the Court of Appeals acted without any impropriety in refusing to accept what in fact was a stipulation on a question of law" (citing Swift & Co. v. Hocking Valley R. Co., 243 U.S. 289 (1917))); United States v. Moyer, 282 F.3d 1311, 1317-1318 (CA10 2002); Dorris v. Absher, 179 F.3d 420, 425-426 (CA6 1999).

And finally, even though the indictment, the government's case at trial, and the jury instructions were each violation of law under Cleveland, in addition to the fact that honest services under §1346 was never alleged, argued, nor submitted, the

Appellate Court concluded on remand that "The indictment, the government's case at trial, and the jury instructions were each sufficient to support a conviction for the fraudulent deprivation of honest services through bribery scheme in violation of §1341 and §1343, which falls squarely within even the recently narrowed parameters of §1346." The Appellate Court based its conclusion mainly on the finding that there was enough evidence to support it. But this Court held that "it is not the [reviewing] court's function to determine guilt or innocence. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out." Kotteakos v. United States, 328 U.S. 763 (1946) (rejecting argument that error is harmless "if the evidence offered specifically and properly to convict [the] defendant would be sufficient to sustain his conviction" on a different theory or under a different statute).

CONCLUSION

1. §1346 does create a separate offense by the specification of distinct elements, each of which has to be charged by indictment, proven beyond reasonable doubt, and submitted to a jury for its verdict.

2. State licenses do not rank as property for purposes of 18 U.S.C. §666(a)(2).

This Court should grant certiorari in order to properly construe §1346 as a separate offense, and declare state licenses not property valued at $5,000

for purposes of §666(a)(2), since both holdings of the Court of Appeals are in direct conflict with this Court's holding in Cleveland and Skilling.

Respectfully submitted,

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pro se.

February 21th, 2011

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

No: 08-2418

United States of America,

Appellee

v.

Mustafa Redzic,

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri – Cape Girardeau (1:07-cr-001100-ERW-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Gruender took no part in the consideration or decision of this matter.

January 13, 2011

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appellate Case: 08-2418 Date Filed: 09/09/2010 Entry ID: 3701744

Nos. 08-2418, 08-3662

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MUSTAFA REDZIC,

Defendant-Appellant

APPELLANT MUSTAFA REDZIC'S SUPPLEMENTAL BRIEF

MUSTAFA REDZIC
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Proceeding pro se

Sep. 02, 2010

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U.S. COURT OF APPEALS

EIGHTH CIRCUIT

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STATEMENT

Mustafa Redzic respectfully submits this Supplemental Brief following the order of this Court dated August 20th, 2010. Redzic was convicted on one mail fraud count under 18 U.S.C. §1341, and one wire fraud count under §1343, both on the theory that he deprived the State of Missouri of money and property in form of commercial Driver's Licenses (CDL). He also was convicted on one count of bribery under 18 U.S.C. §666(a)(2), with subject matter of the bribe being CDL, which government valued in the indictment at $5,000 in order to meet one of the requirements of that statute without which the District Court would have lacked the subject matter jurisdiction pursuant to 18 U.S.C. §3231 to try this case. At trial, defendant's attorneys stipulated, for purposes of fraud counts as well as bribery count that CDL is worth $5,000. After trial, they filed motion for acquittal arguing, inter alia, that the fraud counts should be reversed under Cleveland v. United States, 531 U.S. (2000), which held that State and Municipal licenses in general do not rank as 'property' for purposes of §1341, and that the stipulation should be ignored because "one can't stipulate to something that is impossible under the law." The same motion argued that the briery count should be reversed as well for the same reason, citing 9th Circuit which explained that: "The ordinary meaning of the term 'property' does not include the interest of local government in performing functions such as policing, caring for the indigent sick, and otherwise protecting the well-being of the public" wherefore CDL does not qualify as subject matter valued at $5000 for purposes of §666(a)(2). The

District Court held that "the jury verdicts are not lightly overturned." For purposes of fraud counts, it nullified the stipulation, yet upholding those convictions on the bases of §1346 which criminalizes deprivation of honest services, supplied by the government long after the trial and never heard of by the jury. For purposes of bribery conviction it held fast to stipulation holding that defendant stipulated to the value of CDL and is precluded from arguing otherwise. It consequently upheld that conviction as well. Redzic was also convicted on one conspiracy count under 18 U.S.C. §371 which remained unaffected by the motion. Defendant appealed. This Court affirmed fraud convictions in 2009, rejecting Redzic's challenge of the validity of his fraud convictions on 'honest services' theory under §1346, when the indictment, proof at trial, and the jury instructions all spoke in terms of defendant's using a 'scheme or artifice to defraud state of Missouri of money, property, and other things of value including CDL,' without ever mentioning §1346 or its language until after trial, holding that "section §1346 does not create separate offense but expends the definition of scheme or artifice to defraud for both mail and wire fraud" and it does not necessarily have to appear in the indictment or jury instructions.

Defendant's appellate attorneys negligently omitted raising the issue of legal baselessness of the bribery conviction in this Court. Instead, they raised an interesting but useless and damaging question of whether §666(a)(2) prohibits gratuities, which this Court refused to even consider. That argument left the impression that defendant rewarded Mr. Parr for his misconduct. But that argument also remained unfinished anyway because the defendant withstood

the great pressure that his attorneys exerted on him to let them characterize at least one of the payments made to Mr. Parr as gratuity in exchange for short-testing, even though he testified, as government's star witness that he was compensated for his assistance provided to defendant's company in the process of certification with the Missouri Department of Higher Education, and never testified that any of the payments he received, total of $5,600 plus travel expenses, had anything to do with the short-testing scheme adopted by CDTA owners, Mr. Moore and Mr. Rachel, for purposes of expending the business as the proof at trial showed. This Court affirmed bribery conviction as well, expressly honoring the stipulation which valued CDL at $5,000, only after expressing its belief that the "thrust of the government's case was clearly not that Missouri had been damaged by losing the value of 'the physical pieces of paper on which the licenses had been printed'." Redzic filed motion for rehearing or rehearing en banc. The Eighth Circuit denied the motion and the defendant filed a petition for a writ of certiorari in the Supreme Court of the United States. In his petition, defendant asked the Supreme Court four questions:

1. Whether the mail fraud and wire fraud convictions, which were obtained on the 'money and property' theory may be sustained, after failing on that theory due to the fact that the matter at issue is not property, on the alternative theory of 'honest services' under §1346, when the indictment, proof at trial, or jury instructions never mentioned it.

2. Whether legal bases in bribery prosecution under §666 may be created through stipulation when that basis does not exist as matter

of law, due to the fact that the subject of the bribe is nothing worth $5,000 or more as that, statute requires.

3. Whether the Appellate Court can affirm a bribery conviction when there is nothing on the record to support that conviction.

4. Whether §666(a)(2) prohibits gratuities.

The Supreme Court, after considering defendant's arguments, unanimously vacated the judgment of this Court on all counts and remanded it for further proceedings in light of Skilling v. United States, 561 U.S. ___ (2010). In this brief, defendant will focus only on the first three questions since he raised the fourth one only because it had been raised before and this Court may ignore it this time just like it did the first time around.

ARGUMENT

The District Court Had No Subject matter jurisdiction Pursuant To 18 U.S.C. §3231 To Try Defendant Under 18 U.S.C. §666(a)(2)

In its response in Opposition To Appellant's Motion For Bond, government asserted that the "limited remand from the Supreme Court ... has no effect on the bribery conviction under 18 U.S.C. §666(a)(2)." If the Supreme Court wanted to remand on limited basis, it knew full well how to do it. See Christian Legal Soc'y v. Martinez, No. 08-1371, Slip op. at 31-32 (U.S. June 28, 2010) (Ginsburg, J.) ("On remand, the Ninth Circuit may consider CLS's pretext argument if, and to the extent, it is

preserved."). The bribery conviction in this case raises the question of jurisdiction, and "lack of jurisdiction ... shall be noticed at any time." Sewell v. United States, 406 F.2d 1289 (8th Cir. 1969). Also, "lack of subject matter jurisdiction may be raised at any time." United States v. Arbo, 691 F.2d 862, 865 (9th Cir. 1982). Fed. R. Crim. P. 12(b)(2); United States v. Heath, 509 F.2d 16, 19 (9th Cir. 1974). "Appellate Court that sees that lower court proceeded without subject matter jurisdiction must correct error even if neither party brought it to lower Court's attention." United States v. Foley, 73 F.3d 484 (2nd Cir. 1996).

18 U.S.C. §666(a)(2) requires that the subject of the bribe "involve anything of value of $5,000 or more." The subject of the bribe at issue here, the physical pieces of paper on which licenses had been printed, is not 'property' valued at $5,000 or more. It is no accident that the federal bribery statute requires that the subject of the bribe involve anything valued at $5,000 or more, because the manifest purpose of the bribery statute prohibiting theft or bribery concerning programs receiving federal funds is to safeguard finite federal resources from corruption and to police those with control of federal funds. United States v. Rooney, C.A.2 (N.Y.) 1994, 37 F.3d 847. To be sure, bribery statute was intended to protect integrity of federal funds, and not as general anticorruption statute. United States v. Frega, S.D. Cal 1996, 933 F. Supp. 1536. Congress, in enacting statute which makes it federal offense to corruptly give anything of value to any person, with intent to influence or reward agent of local government, intended to safeguard federal resources

from corruption and police those with control of federal funds. United States v. Bigler, S.C. Fla 1995, 907 F. Supp. 401.

Ninth Circuit leaves no doubt as of whether "physical pieces of paper on which licenses had been printed" qualifies as 'property' for purpose of §666(a)(2).:

> The ordinary meaning of term 'property' does not include the interest of local government in performing functions such as policing, caring for the indigent sick, and otherwise protecting the well-being of the public.

Canyon County v. Syngenta Seeds, Inc., 2008 U.S. App. Lexis 5904 (9th Cir. 2008). In Canyon County, the 9th Circuit held that:

> the law commonly distinguishes between the status of a governmental entity acting to enforce the laws or promote the general welfare and that of a governmental entity acting as a consumer or other type of market participant. When a governmental body acts in its sovereign or quasi sovereign capacity seeking to enforce the laws or promote the public well-being, it cannot claim to have been 'injured in [its] property' for RICO purposes based solely on the fact that it has spent money in order to act governmentally. All government actions require expenditure of money in this sense, insofar as the government acts through public servants who are paid for their service. We find it particularly inappropriate to label governmental entity 'injured in its property'

> when it spends money on the provision of additional public services, given that those services are based on legislative mandates and are intended to further the public interest.

Canyon County at 16-17 citing Alfred L. Snapp & Son, Inc., v. Puerto Rico, ex rel Barez, 458 U.S. 592, 601-602, (1982).

The State's regulation of CDLs is a function of State police power and a means to protecting general public welfare. Following the holding in Canyon County, the mere fact that the State has spent money in order to act governmentally in regulating CDLs does not make CDL 'property' under 18 U.S.C. §666(a)(2) valued at $5,000 or more. Because subject matter of the bribe does not involve "anything of value of $5,000 or more," the District Court lacked no jurisdiction pursuant to 18 U.S.C. §3231 to try defendant in this case. The government was aware of this and it evaded the law using stipulation. It stipulated that CDL is property valued at $5,000. In the Reply to Redzic's certiorari petition, government contended that to a license recipient, the license value exceeds $5,000, asserting that that's all that bribery statute requires, reading into that statute not only something that is not there, but something that is not compatible with the very purpose of that statute which is to protect integrity of federal funds, and was never intended to be general anticorruption statute. United States v. Frega. Even if the statute did read the way government desires, the indictment alleged that CDL is worth $5,000 to the State of Missouri. In any case, whether CDL, qualifies as subject matter of §666(a)(2) is not a question of fact

for private parties to decide, but a question of law for the Court. The Supreme Court has long held that "constitutional questions will not be passed on ... an agreed statement of facts," Greenville County Fair Ass'n v. Christenberry, 198 S.C. 338, 17 S.E. 2d 857 (1941), and that "parties cannot stipulate to a particular construction of a ... law." Burger King Corp. v. Rudzevicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed 2d 528 (1985). This directly answers petitioner's question number two presented to The Supreme Court, namely whether such important issues as legal bases of a statute can be decided through stipulation. This is why the Court vacated and remanded defendant's bribery count. This Court was also confronted with this self-imposing issue on direct appeal when it honored the stipulation and noted it in a footnote.

The evidence does not support the bribery conviction. Government accused the defendant of bribing Mr. Parr to short-test his students. Evidence shows clearly that CDTA's owners, Parr's employers, adopted short testing policy for their own gain and defendant never met the owners nor had he ever any dealing with them. Besides, government showed tapes at trial with Mr. Crutchfield, and not Mr. Parr, short-testing students, and he testified that nobody ever bribed him. Mr. Parr testified that defendant compensated him for services he provided to Redzic's company in the process of certification with the Missouri Department of Higher Education, and never testified that he was bribed. As a matter of fact, no witness ever testified that there was any bribery coming from defendant and going to anybody. The jury convicted because government told them,

after all witnesses left the stand, that bribery was involved in the whole business.

Section 1346 Creates A Separate Offense And Has To Be Charged In The Indictment And Given In Jury Instructions

"It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. Jackson v. Virginia, 443 U.S. 307 (1979). In this case, "honest services" under 18 U.S.C. §1346 was neither charged nor tried. This Court upheld the fraud convictions on the basis that §1346 "brought schemes to deprive another of honest services within the scope of the mail fraud and wire fraud statutes;' it does not create a separate offense but expands the definition of scheme or artifice to defraud for both mail and wire fraud." United States v. Redzic, 569 F.3d 841 (8th Cir. 2009). Since this section does not create a separate offense, this Court reasoned, it is not fatal if the indictment omits to include it or the term "honest services." Consequently, the jury instructions don't have to mention it either, as long as they lay out the four elements of mail fraud. The Supreme Court instructed this Court to make determination on this issue in light of Skilling v. United States, 531 U.S. (2010), so the question here is what insight does Skilling provide. The Supreme Court took great care and effort to get to the bottom of honest services doctrine, since this was the second time for this issue to be in that Court. It explained:

> In 1909, Congress amended the [original Statute of 1872] to prohibit, as it does today, 'any scheme or artifice to defraud, or for

> obtaining money or property by means of false or fraudulent pretenses, representation, or promises. '1341 (emphasis original); Emphasizing Congress' disjunctive phrasing, the Courts of Appeals, one after the other, interpreted the term 'scheme or artifice to defraud' to include deprivations not only of money or property, but also of intangible rights. ... Unlike fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other, the honest services theory targeted corruption that lacked similar symmetry. While offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment ... Even if the scheme occasioned a money or property gain for the betrayed party, Courts reasoned, actionable harm lay in the denial of that party's right to the offender's 'honest services.' Skilling.

The right to honest services is clearly not part of Statute's semantics and Courts of Appeals took almost a century until, in 1982, all of them embraced this doctrine, not because it was clearly spelled out, but only because they felt it permissible due to the Congress' disjunctive language. The Supreme Court stopped this development explaining that:

> the words 'to defraud' commonly refer to wronging one in his property rights by dishonest methods or schemes, and usually signify the deprivation of something of value

by trick, deceit, chicane, or overreaching. McNally.

Since the Supreme Court understood dishonesty to be just the method of fraud, and not the crime itself, it limited the Statute in scope to the protection of property rights. In Redzic, this Court took dishonest methods to be the crime itself when it pointed out that Mr. "Parr's practice of administering inadequate short tests" actually meant "withholding the honest services he owed the State of Missouri." The Supreme Court did recognize that there are intangible rights that the Congress might want to protect and said in McNally; "if the congress desires to go further, [than protection of property rights] it must speak more clearly." This answers the question of whether an indictment has to allege deprivation of honest services in mall and wire fraud prosecution. Since "the words 'to defraud' commonly refer to wronging someone in his property rights by dishonest methods," the prosecution must be limited to theft of property, and if government "desires to go further, it must speak more clearly" in the indictment. In Skilling, it became very clear that the two components of mail and wire fraud statutes, conventional money/property component and honest services component create two very different offenses. Each one of them has different requirements and different objects of conspiracy. While conventional component criminalizes deprivation of money/property and does not require bribe to be involved, honest services component criminalizes the denial of the betrayed party's right to offender's honest services only if that denial arises out of a bribe and kickback, even if the scheme

occasioned in a money/property gain for the betrayed party. In Skilling, the Supreme Court unanimously ruled that a violation of his Sixth Amendment jury trial right occurred. (i.e. the jury instructions authorized conviction for conduct that is not an offense under the mail/wire fraud statute). Therefore, the conviction en all mail/wire fraud counts must fall "like dominos" unless the government can prove beyond reasonable doubt that the improperly constructed component did not taint the jury's mind. This makes it crystal clear that the two components of the fraud statute must be properly constructed, separately alleged in the indictment, and separately instructed to the jury. In Redzic; the jury instructions authorized conviction on the theory that he perpetrated a scheme or artifice to defraud the State of Missouri of money and other things of value including CDLs, a conduct that is not an offense under the mail fraud statute due to the fact that licenses do not qualify as property for purposes of mail/wire fraud. Cleveland. The theft of honest services was never alleged in the indictment nor instructed to the jury. Even if the indictment alleged honest services component and jury instructions gave it, the government would face an impossible task now to prove beyond reasonable doubt that the improperly constructed property component did not taint jurors' mind. The Supreme Court ruled in Skilling that Yates v. United States, 354 U.S. 298 (1957) applies in his case (constitutional error occurs when a jury is instructed on alternative theories of quilt and returns a general verdict that may rest on a legally invalid theory). This settles any remaining question of whether §1346 creates a separate offense and consequently has to be alleged in the indictment

and instructed to the jury. Because the answer is affirmative, the fraud convictions must be reversed in this case.

If government still wants to argue that it did allege the deprivation of honest services and was trusted by that force at trial, it should go back to the transcripts and read Tr. I-142: "what makes this case a federal case instead of a state case is that the CDLs, because they allow people to go out there and make living as a truck driver, had a value in excess of $5,000." (USA Katherine Hanaway in her opening statement to the jury). Also at the hearing for motion of acquittal, AUSA Thomas Albus, asked the Court to be very specific as to the basis of the ruling if there is a judgment of acquittal, if the Court finds that "CDLs are not property under Cleveland; therefore, what the government charged the defendant with was not a crime, so he can't be convicted of it, well, then, we would consider .. charging the scheme to defraud the State of Missouri out of the right to honest services." He went on saying: "I think you'd get the drift of where I'm going because we may have to consider additional charges." Thus the thrust of the government's case was clearly that Missouri had been damaged by losing the value of CDLs. At the Certiorari stage, government asked the Supreme Court "whether the indictment's allegations of mail fraud and wire fraud were sufficient to put petitioner on notice that he could be convicted of honest-services fraud. By vacating the judgment of this Court which had answered that question affirmatively, the Supreme Court clearly unanimously held that they were not sufficient. Just like in Skilling, here too, a violation of defendant's Sixth Amendment jury trial right occurred. The jury

instructions authorized conviction for conduct that is not an offense under mail/wire fraud statute. But unlike Skilling in this case a violation of defendant's Fifth Amendment right to proceed only on an indictment issued by the grand jury. The amendment of the indictment prejudiced Redzic because the government never gave him notice of its intent to proceed on an honest services theory. Therefore, Skilling mandates reversal on mail/wire fraud counts.

The only remaining conspiracy count, 18 U.S.C. §371 depends entirely on the substantive fraud and bribery counts. It is not illegal to conspire to perform acts that are not crimes. The "vicarious liability" of a co-conspirator "is predicated upon proof that someone among the conspirators committed the substantive crime at issue." United States v. Ruiz, 462 F.3d 1082, 1088 (9th Cir. 2006). Accord, McNally, 483 U.S. at 361 ("government concedes that if petitioners' substantive mail fraud convictions are reversed their conspiracy convictions should also be reversed").

CONCLUSION

For these reasons, the Court should reverse convictions on all counts and restore any forfeited property or the proceeds thereof to Mr. Redzic.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this brief has been mailed to the following counsel:

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Respectfully submitted,
/s/ Mustafa Redzic
Sept 2, 2010

PLEA FOR LIBERAL CONSIDERATION

As a pro se litigant, petitioner implores this Court to liberally construe this brief and invoke the teachings in Heines v. Kernev, 404 U.S. 519, (1972); pro-se litigant's pleadings are to be construed and held to less stringent standards than formal pleadings drafted by lawyers. If the Court can reasonably read pleadings to state valid claims on which litigant can prevail, it should do so despite failure to cite proper legal authorities, confusion of legal theories, poor syntax, sentence construction, or litigant's unfamiliarity with pleading requirements.

Appellate Case: 08-2418 Date Filed: 11/01/2010 Entry ID: 3720124

Nos. 08-2418, 08-3662

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MUSTAFA REDZIC,

Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

APPELLANT MUSTAFA REDZIC'S SUPPLEMENTAL BRIEF

MUSTAFA REDZIC
3700 Wright Ave.
Big Springs, TX 79720

Proceeding pro se

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MICHAEL GANS
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The mail and wire fraud counts charged Redzic with depriving the State of "property" - i.e. the commercial drivers licenses (CDL), and nothing else. Government proceeded at trial on that theory telling the jury that "what makes this case a federal case instead of a state case is that the CDLs [ ] had a value in excess of $5,000." Tr I-142. The jury instructions submitted the theory that Redzic deprived the State of money and property in form of CDLs and no other.

The government belatedly realized that the theory on which it had indicted Redzic, and on which jury convicted, had no legal merit. It then decided that it had submissible case that Redzic had deprived the State of the honest-services in violation of §1346.

The issue in this Court on direct appeal was whether mail and wire fraud judgments may be sustained on the honest-services theory when the indictment never charged it nor mentioned §1346, government never argued it at trial, and the jury was never instructed on such a theory.

This Court upheld the fraud convictions on the uncharged and uninstructed honest-services theory holding that it doesn't necessarily have to appear in the indictment or jury instructions. "The indictment cites §§§1341 and 1343, which establish the substantive offenses of mail and wire fraud. It does not specifically cite §1346, but that section does not create a separate offense; it merely defines a term contained in §§1341 and 1343. It was therefore not necessary to cite it in the charging instrument." United States v. Redzic, 569 F.3d 841 (8th Cir. 2009). Jury was specifically instructed that Redzic deprived

the State of money and property. This Court found no problem with that holding that "the phrase 'scheme to defraud' includes plans to deprive another of property but is not necessarily limited to such plans. It would have been preferable had the district court used the term 'honest service' in place of 'property', ... but a district court's instructions will be upheld if, 'when read as a whole, [they] fairly and adequately contain [ ] the law applicable to the case'." Id, citing United States v Casas, 999 F.2d 1225, 1230 (8th Cir. 1993). The question on remand now is whether this holding can withstand Skilling close inspection, since the jury was expressly permitted to convict on money/property theory which is not mail/wire fraud at all in this case.

In bribery prosecution under 18 U.S.C. §666(a)(2), the district court committed constitutional error by submitting a legally erroneous theory of liability that Redzic bribed Mr. Parr in process of illegally acquiring something of value in excess of $5,000, while the alleged subject of the bribe, commercial drivers license, by law constitutes no property or "anything of value of $5,000 or more," as the bribery statute requires. District court rejected Redzic's argument raised in his post-trial motion for acquittal that the bribery conviction has no legal bases since the subject of the bribe constitutes nothing of value in excess of $5,000 by simply stating that the defendant stipulated to the value of licenses and is precluded from arguing otherwise. This Court upheld the bribery conviction obtained on this legally erroneous theory in the same way the district court did, by honoring the stipulation at issue. In his petition for certiorari, Redzic argued that his bribery conviction under

§666(a)(2) was obtained on legally impermissible ground since the subject of the bribe, CDL, constitutes nothing of value of $5,000 or more. The Supreme Court vacated the bribery conviction along with the fraud convictions with the instruction to resolve the validity of all Redzic's convictions in light of Skilling. In Skilling, The Supreme Court held that "because the indictment alleged three objects of the conspiracy [one of which is legally erroneous], Skilling's conviction is flawed." It remanded that case to the Fifth Circuit to ascertain whether his convictions rest on legally permissible or impermissible ground. Accordingly, this Court must ascertain whether the object of the fraud and bribery conspiracies alleged in Redzic is legally erroneous and consequently, whether Redzic's convictions rest on legally permissible or impermissible ground. Government, in its Response In Opposition To Appellant's Motion For Bond, asserts that Skilling "has no effect on the bribery conviction under 18 U.S.C. §666." Government is urging this Court to infer that The Supreme Court's position on a general verdict as being "flawed" in a situation where three objects of the conspiracy are alleged, one of which is legally impermissible, and that in such a situation Yates error applies, has no consequences in regards to a verdict predicated entirely on one, legally erroneous, object of the conspiracy, as is the case in Redzic's bribery conviction. The only way to resolve the validity of appellant's bribery conviction in light of Skilling is to ascertain if that conviction rests on legally permissible or impermissible ground as the validity of Skilling's own convictions will be resolved on remand.

STANDARDS OF REVIEW

In its supplemental brief, government asserted that it "believes this case involves determination of the sufficiency of the evidence to sustain the mail fraud and wire fraud conviction of the defendant in light of new precedent. Accordingly, the government suggests the typical standard of review for such an appeal should apply."

First of all, The Supreme Court vacated the judgment of this Court on three, and not two substantive counts and one conspiracy count; mail fraud under §1341, wire fraud under §1343, bribery under §666(a)(2), and conspiracy under §371. Second, the issue in Skilling in the Supreme Court was not the sufficiency of the evidence, and neither is it here, so the standards that now apply are not those of sufficiency challenge. The Supreme Court ruled in Skilling, that a violation of affecting Mr. Skilling's Sixth Amendment jury trial right occurred (i.e., the jury instructions authorized conviction for conduct that is not an offense under the mail/wire fraud statute). Translated to this case, Redzic's Sixth Amendment jury trial right occurred too, because the jury instructions authorized conviction for conduct that is not an offense under the mail/wire fraud statutes, and conviction for conduct that is not an offense under the federal bribery statute, §666(a)(2). In Skilling, the Supreme Court reaffirmed the long standing rule that "constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory." Skilling (citing Yates v. United States, 354 U.S. 298 (1957)).

Here, the verdict on fraud counts rests entirely on legally invalid money/property theory, and the verdict on bribery count rests on the improper construction of that statute due to the fact that jury convicted on the theory that Redzic bribed Mr. Parr in process of illegally obtaining CDLs; subject of the bribe that is by law not "anything of value in excess of $5,000" as that statute requires. The question now is not whether the government introduced legally sufficient evidence to secure a conviction absent the error that is, whether "the case **could** have been won" without the error. United States v. L.E. Myers Co., 562 F.3d 855 (7th Cir. 2009). (emphases in original); see Yates v. Evatt, 500 U.S. 391, 406-07 (1991). The Supreme Court has noted that the issue is not even "whether, in a trial that occurred without error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in **this** trial was surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. 275 279 (1993) (emphases in original); Chapman v. California, 386 U.S. 18, 24 (1967) (government must prove "that the error complained of did not contribute to the verdict **obtained**) (emphases added); reversal is required "if there is a **reasonable possibility** that the [error] complained of **might have contributed** to the conviction." Yates, 500 U.S. at 403 (quoting Chapman, 386 U.S. at 24)(emphases added). Seventh Circuit concluded that viewing the evidence in the light most favorable to the government would "flatly contradict" an inquiry, such as the one now before this Court that is directed toward ascertaining whether a conviction "might rest on an invalid ground. " United States v. Cappas, 29 F.3d 1187, 1194 & n4 (7th Cir. 1994).

ARGUMENT

In Skilling, jury returned general verdict of guilty after being instructed on two alternative theories of guilt, money/property and honest-services theory, one of which the Supreme Court ruled impermissible ground for conviction in that case.

On remand, the Fifth Circuit has to determine whether the district court's "constitutional error" in allowing the government to submit its legally erroneous theory of guilt to the jury was harmless as to **any** of his convictions. All Skilling's convictions are now presumptively invalid and **government** can overcome that presumption only by proving, beyond reasonable doubt, that the erroneous submission of the legally invalid theory to the jury **did not** affect his convictions, that is, that **none** of the twelve jurors convicted for fraud by following legally impermissible instruction.

In Redzic, district court's "constitutional error" in allowing the government to submit legally invalid theories in fraud and bribery prosecutions render **all** Redzic's convictions invalid unless the **government** can prove, beyond reasonable doubt, that the erroneous submission of the legally invalid theories did **not** contribute to the guilty verdict. Government cannot accomplish that because in this case, unlike Skilling, only one theory of guilt was submitted, the invalid one.

Guilty verdict on bribery count under 18 U.S.C. §666(a)(2) was entirely predicated on the theory that Redzic bribed Mr. Parr to obtain State's property in form of CDL valued in excess of $5,000, The subject matter of the bribe, CDL, is not property and does not "involve anything of value of $5,000 or

more, as the federal bribery statute requires. Ninth Circuit held that:

> The ordinary meaning of term 'property' does not include the interest of local government in performing functions such as policing, caring for the indigent sick, and otherwise protecting the well-being of the public.

Canyon County v. Syngenta Seeds, Inc., 2008 U.S. App. Lexis 5904 (9th Cir. 2008). It further held that:

> The law commonly distinguishes between the status of a governmental entity acting to enforce the laws or promote the general welfare and that of a governmental entity acting as a consumer or other type of market participant. When a governmental body acts in its sovereign or quasi sovereign capacity seeking to enforce the laws or promote the public well-being, it cannot claim to have been 'injured in [its] property' for RICO purposes based solely on the fact that it has spent money in order to act governmentally. All government actions require expenditure of money in this sense, insofar as the government acts through public servants who are paid for their service. We find it particularly inappropriate to label governmental entity 'injured in its property' when it spends money on the provision of additional public services, given that those services are based on legislative mandates and are intended to further the public interest.

Canyon County at 16-17 citing Alfred L. Snapp & Son, Inc., v. Puerto Rico, ex rel Barez, 458 U.S. 592, 601-602, (1982).

The State's regulation of CDLs is a function of State police power and a means to protecting general public welfare. Following the holding in Canyon County, the mere fact that the State has spent money in order to act governmentally in regulating CDLs does not make CDL 'property' under 18 U.S.C. §666(a)(2) valued at $5,000 or more. Because the district court instructed the jury that Redzic acquired state's property valued in excess of $5,000 in form of CDL through bribery, while CDL is not state's property at all, it committed "constitutional error" and the question on remand now is not "whether, in a trial that occurred without error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in **this** trial was surely unattributable to the error." Sullivan v. Louisiana, 508 U.S. (1993) (emphases in original); Chapman v. California, 386 U.S. (1967)(government must prove "that the error complained of did not contribute to the verdict **obtained**); reversal is required "if there is reasonable possibility that the [error] complained of did not contribute to the conviction." Yates, 500 U.S. at 403 (quoting Chapman, 386 U.S. at 24). The erroneous jury instruction did not only contribute to the verdict obtained. The bribery conviction was entirely predicated on the erroneous theory that Redzic deprived state of property in form of CDLs while CDLs are not state property at all. Since Skilling's conviction is "flawed" and the Fifth Circuit must now ascertain that none of his convictions rests on legally impermissible ground, this Court must do the same. Because government cannot remotely prove that Redzic's bribery conviction does not rest on legally impermissible ground, it did not even try. This Court

must ignore the stipulation in this case where parties stipulated to the value of CDLs as being $5,000 because this is not a question of fact for private parties to decide, but a question of law for the Court. Supreme Court has long held that "constitutional questions will not be passed on [ ] an agreed statement of facts," Greenville County Fair Ass'n v. Christenberry, 198 S.C. 338, 17 S.E. 2d 857 (1941), and that "parties cannot stipulate to a particular construction of a [ ] law." Burger King Corp. v. Redzevicz, 471 U.S. 462, S.Ct. 2174, 85 L.Ed 2d 528 (1985). Therefore, Skilling mandates reversal on bribery count.

Government fares no better on the two fraud convictions. The guilty verdicts on mail and wire fraud counts under §1341 and §1343 are entirely predicated on the theory that Redzic deprived the State of property in form of CDLs, a theory of mail/wire fraud that is invalid under Cleveland. The parties in this case are not disputing over the question of whether the theory of guilt on which jury convicted was permissible or impermissible ground for conviction, since Cleveland leaves no room for doubt that it is not permissible. The dispute on direct appeal in this Court the first time around was about whether this illegal conviction may be sustained on the alternative honest services theory of mail fraud under §1346, when that theory was neither alleged in the indictment, nor argued at trial, nor instructed to the jury- This Court held before Skilling that the two components of the mail/wire fraud, money/property and honest services one, are both included in the phrase "scheme or artifice to defraud," and that "the substantive offenses of mail and wire fraud may therefore be committed by using

either medium to deprive another of property or of the right to honest services." "The indictment cites §1341 and §1343 which establish the substantive offenses of mail and wire fraud. It does not specifically cite §1346, but that section does not create a separate substantive offense; it merely defines a term contained in §§1341 and 1343. It was therefore not necessary to cite it in the charging instrument." "The prosecutor neglected to use the phrase 'deprivation of honest services' [at trial, but] that is not determinative." As far as jury instructions are concerned, "it would have been preferable had the district court used the term 'honest-services' in place of 'property', but a district Court's instructions will be upheld if, 'when read as a whole, [they] fairly and adequately contain [ ] the law applicable to the case." Redzic

The Supreme Court fully settled the dispute over whether the honest-services component of mail/wire fraud under §1346 has to be alleged in the indictment, argued at trial, and instructed to jury, In Skilling, it held that Yates error applies in a situation where both theories are submitted to jury while one of them is erroneous: "Constitutional error occurs when a jury is instructed on alternative theories of guilt [money/property and honest-services] and returns a general verdict that may rest on a legally invalid theory." These two theories not only have to be instructed to jury in order to convict on them, but they contaminate each other when one of them is erroneous. The Supreme Court held in Skilling that "because the indictment alleged three objects of the conspiracy - honest services wire fraud, money-or-property wire fraud, and securities fraud - Skilling conviction is flawed," due to the fact that one

of the three objects of conspiracy, honest services fraud, is legally impermissible ground for conviction in that case.

Where, as in Redzic, the indictment alleged only one object of the conspiracy, money-or-property theft in form of CDLs, which is by taw not mail/wire fraud at all, the convictions on both fraud counts must be reversed. Government cannot credibly contend now that it wasted trial court's time and resources wrestling over the money/property theory while it actually meant the honest-services theft, knowing that the former was unnecessary and meaningless. Jury was given only one, the invalid bases to convict and the jury must be presumed to have followed the instructions. See Weeks v. Angelone, 528 U.S. 225, 234 (2000); Richardson v. Marsh, 481 U.S. 200, 211 (1987). Government cites cases in its supplemental brief in which conviction on honest services theory was affirmed after Skilling, all of which are irrelevant to this case because all those defendants **were** convicted on honest services by jury in accordance with Supreme Court's reading of honest services statute in Skilling.

Government doesn't even try--and properly so--to show why the conviction on fraud counts which was obtained on legally invalid theory should be upheld on uncharged and uninstructed honest services theory. Instead, it is urging this Court to coin a brand new conviction "in light of new precedent" based on the evidence presented in illegal prosecution under §666(a)(2) and illegal conviction on money/property theory. This new conviction as government is suggesting, should be handed down on uncharged and uninstructed honest-services theory of mail/wire fraud.

But it has been long settled that a conviction cannot be sustained merely by showing that there was sufficient evidence to convict before a jury if it had been instructed on legally valid theory. See Kotteakos v. United States, 328 U.S. 750, 767 (1946) (rejecting argument that error is harmless "if the evidence offered specifically and properly to convict [the] defendant would be sufficient to sustain his conviction" on a different theory). Therefore, submitting a legally erroneous theory of liability is constitutional error requiring reversal, as is the case here.

CONCLUSION

For, reasons stated above and in defendant's supplemental brief, Skilling mandates reversal on all counts, since both convictions, fraud and bribery, were obtained on legally invalid theory of guilt.

Respectfully submitted,
/s/ Mustafa Redzic
October 28, 2010
Mustafa Redzic #34236-044
3700 Wright Ave.
Big Spring, TX 79720

Proceeding Pro se

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of this brief has been mailed to the following counsel:

Thomas C. Albus,
U.S. Attorney Office
111 South 10th Street, Room 20.333
St. Louis, MO 63102

/s/ Mustafa Redzic
October 28, 2010

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

Government Exhibit 1-4

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 1:07CR110 HEA (LMB)
vs.	)	
MUSTAFA REDZIC,	)	
Defendant.	)	

STIPULATION OF THE PARTIES

COMES NOW the parties, by and through counsel, and agree and stipulate as follows.

1. In the year 2004 and 2005, the State of Missouri received in excess of $10,000 in aid from the United States of America.
2. **A Commercial Drivers License is a matter worth in excess of $5,000.**
3. At all relevant times, Troy Parr was an agent of the State of Missouri while working at the Commercial Drivers Training Academy.
4. The wiring of funds between the defendant and Troy Parr on or about January 21, 2005 involved the transmission of funds in interstate commerce.

5. The Transmission of forms and other information between Commercial Drivers Training Academy and the State of Missouri on or about April 15, 2005 involved the United States mail.

So stipulated:

/s/ Arthur S. Margulis, Esq.
William S. Margulis, Esq.
Counsel for the defendant

/s/ Mustafa Redzic

/s/ Thomas C. Albus, Esq.
Assistant U.S. Attorney

UNITED STATES DISTRICIT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 1:07CR00110 HEA
MUSTAFA REDZIC and TROY PARR,	)	
Defendants.	)	

INDICTMENT

COUNTE ONE (bribery)

The Grand Jury charges that:

A. Introduction

1. At all times material to this indictment, the State of Missouri, through its Department of Revenue issued driver's licenses including a standard, class F driver's license and commercial driver's licenses. Missouri regulates the issuance of these licenses, sets rules and requirements for their issuance and both employs officials and contractors with third parties to administer driver's tests and prepare appropriate paperwork documenting the issuance of licenses. This process of regulating the issuance of drivers licenses, and the integrity of each

license, is essential to the economic welfare and public safety of Missouri and is therefore, a matter worth more than $5,000.00 to the State of Missouri.

2. At all times material to this indictment, defendant Troy Parr ("Parr") was a driver's license examiner certified by the State of Missouri and employed at a testing facility doing business under various names at 315 Lynual in Sikeston, Missouri area within the Eastern District of Missouri. In this capacity Parr was responsible for, among other things, administering driver's license examinations to those seeking such licenses and supervising other testers, determining whether applicants qualified for such licenses and preparing the appropriate paperwork to memorialize the foregoing tests and results. At all relevant times, Parr conducted examinations or supervised the examination of those seeking Commercial Drivers' Licenses ("CDL's") at the aforementioned Sikeston facility. CDLs are required for those driving large trucks.

3. At all times material to this indictment, the defendant Mustafa Redzic ("Redzic") was a resident of St. Louis, Missouri who ran a driver education business. This business was worth in excess or $5,000.00 to the defendant.

4. Beginning on or about January 1, 2004 and continuing to on or about April 21, 2005, with the exact dates unknown to this Grand Jury, Redzic developed a relationship with Parr such that he would send his customers to Parr's testing facility in Sikeston (the "testing facility") in expectation that they would receive "short tests" for their commercial

drivers licenses. That is, Redzic could and did expect that his customers would receive a much less rigorous test than is proper under Missouri standards. For example, Parr's tests of Redzic's customers would take approximately one half hour when a proper examination should take approximately two hours. Also, multiple students often took the same "short test" at once.

In exchange for this favorable treatment, Redzic agreed to pay Parr's facility the maximum fee authorized. Redzic was also willing to send his students on a two-hour one-way trip, past numerous other accredited testers, to receive such favorable treatment. Parr benefited by the steady stream of business and Redzic benefitted from the nearly 100% success rate his students enjoyed testing at Parr's facility.

Redzic also invited Parr to St. Louis on numerous occasions where Parr would "consult" with Redzic on his drivers' education operation in St. Louis. Redzic would cover Parr's expenses on these trips as well as provide Parr with a cash payment. Sometimes these cash payments were for a few hundred dollars, sometimes they were several hundred dollars and on one occasion Redzic paid Parr two thousand five hundred dollars. All the cash payments were made in consideration of and as a reward for the favorable treatment Parr extended to Redzic's clients at the Sikeston facility. In addition to cash payments, Redzic promised to eventually hire Parr as the director of his drivers' education facility in St. Louis and promised Parr he would share in its considerable profits. These promises were likewise

made in consideration of and as a reward for the favorable treatment Redzic's clients received from Parr. During this process, Redzic paid Parr bribes in excess of $5,000.00.

5. For example, on or about February 25, 2005, Redzic gave Parr a cash payment in exchange for and as a reward for the favorable treatment his clients received from Parr. After they had passed their examinations at Parr's facility, Redzic's clients could obtain more lucrative employment open to commercial drivers and, therefore, a CDL was worth in excess of $5,000.00 to Redzic's clients.

6. Between on or about January 1, 2004 and April 21, 2005 Redzic obtained approximately six hundred licenses for his clients through Parr according to this arrangement for which he paid Parr in excess of $5,000.00 in bribes. Redzic, through his company Bosna Truck Driving School earned approximately $1,800,000.00 in tuition from those six hundred clients.

7. At all relevant times material to this indictment:

a. The State of Missouri received federal assistance in excess of $10,000 per year during 2004 and 2005.

b. Troy Parr was an agent of the State of Missouri, in that he served as a drivers license examiner for the State. In that capacity, Parr was empowered to conduct drivers license examinations and declare applicants for drivers licenses either successful or unsuccessful. Successful applicants

were awarded driving privileges by the State of Missouri.

B. Offense Conduct

8. On or about the February 25, 2005 in the Eastern District of Missouri, the defendant,

MUSTAFA REDZIC,

did knowingly and corruptly give, offer and agree to. give something of value to wit: cash payments, interests in his business and employment by his business, to another, intending to influence or reward the issuance of a drivers licenses to his clients, said licenses having a value of $5,000 or more to the State of Missouri, the defendant and the applicant.

In violation of Title 18, United States Code, Section 666(a)(2).

COUNT TWO (Conspiracy)

A. Introduction

9. The allegations set forth in paragraphs 1 through 8 are hereby incorporated by reference.

B. The Conspiracy

10. Beginning on or about January l, 2004 and continuing until on or about April 21, 2005, with the exact dates unknown, within the City of St. Louis

and Scott County within the Eastern District of Missouri and elsewhere,

MUSTAFA REDZIC and
TROY PARR

and others known and unknown to the Grand Jury did knowingly combine, conspire, confederate and agree with each other to commit certain offenses against the United States, as follows:

a. To knowingly devise a scheme and artifice to defraud and to obtain monies and property by means of false or fraudulent pretenses, representations, or promises and in executing the scheme and artifice to defraud did use the United States mails in violation of Title 18, United States Code, Section 1341;

b. To knowingly devise a scheme and artifice to defraud and to obtain monies or property by means of false or fraudulent pretenses, representations or promises and to execute said scheme and artifice to defraud by means of the transmission of wires, writings, signs and signals in violation of Title 18, United States Code, Section 1343;

c. To knowingly and corruptly give something of value to a state official intending to influence and reward said state official with respect to a matter exceeding $5,000.00 in violation of Title 18, United States Code, Section 666.

C. Means and Methods

11. The means and methods by which the conspiracy was sought to be accomplished, included, among other things, the following:

a. It was part of the conspiracy that at various times, the defendants and other would arrange for a student of Redzic's truck driving school which was then known as Bosna Truck Driving School to travel from is facility in St. Louis, Missouri within the Eastern District of Missouri more than two hours past numerous other state facilities to the testing facility at which defendant Parr worked and supervised the work of other testers so that they would only have to submit to the "short tests" given at the testing facility. In one instance, Redzic persuaded defendant Parr to pass two of his students who never even showed up in Sikeston for a test.

b. It was part of the conspiracy that Redzic agreed to pay the maximum fee allowed by the State of Missouri to the testing facility.

c. It was part of the conspiracy that after almost invariably passing Redzic's students after a "short test" Parr or another tester under his supervision would falsely complete paperwork to be mailed to the State of Missouri Department of Revenue stating that each student had submitted to and passed a full, complete, three-part Missouri CDL test and had demonstrated adequate proficiency in each essential part of the test.

d. It was part of the conspiracy that, from time to time, Redzic would wire Parr money in and affecting interstate commerce, these payments would either be for the testing facilities' charges or for Parr personally. In any case, the wired money was in furtherance of the short testing program at the testing facility.

e. It was part of the conspiracy that from time to time, Redzic would make cash payments to Parr in order to influence his decision to continue "short testing" his student or reward past "short tests." Redzic would also invite Parr to visit his school in St. Louis where Redzic would promise Parr to eventually hire him as the director of the school at which time Parr would come to share in its large profits.

D. Overt Acts

12. On or about January 21, 2005, in the Eastern District of Missouri, Redzic transmitted by a wire affecting interstate commerce $ 1,050.00 to the personal bank account of Parr.

13. On or about February 25, 2005, in the Eastern District of Missouri, Redzic gave Parr a cash payment of $2,500.00 to influence and reward his official actions on behalf of the State of Missouri, to wit: his supervision of the "short testing taking place at the testing facility.

14. On or about April 15, 2005, in the Eastern District of Missouri, Parr mailed and caused to be mailed to the Missouri Department of Revenue in Jefferson City, Missouri false test results for two students of Redzic, S.N. and N.B.

All in violation of Title 18, United States Code, Section 371.

COUNT THREE (Mail Fraud)

A. Introduction

15. The allegations set forth in paragraphs 1 through 14 are hereby incorporated by reference.

16. At all relevant times, third party testers like Parr would prepare paperwork upon completion of the testing necessary for CDL licensure in Missouri under the laws of Missouri and the United States. In the case of Parr, a Missouri Department of Revenue form 5050 would be completed and transmitted to the appropriate state office by means of the United States mails. It was Parr's practice in every case to transmit the results of his testing and any testing taking place at the facility in Sikeston, Missouri where he worked by means of the United States mail.

17. Upon receipt of the test results, the State of Missouri would then process the results and complete additional paperwork which would result in the issuance of a CDL to a particular applicant.

B. The Scheme

18. At some point unknown to the Grand Jury but no later than January 1, 2004 continuing through on or about April 21, 2005,

MUSTAFA REDZIC, and
TROY PARR,

the defendants and others known and unknown to the Grand Jury devised a scheme and artifice to defraud the State of Missouri of money and other

things of value including CDLs by means of the submission of material falsehoods and misrepresentations of material facts through the United States mails;

a. It was part of the scheme and artifice that the defendants agreed that two of the defendant's clients known to the Grand Jury whose initials are S.N. and N.B. (referred to hereafter in this Count as the "clients") who were unable to make the two-hour trip from St. Louis to Sikeston would simply be issued CDLs without submitting to testing. It was the agreement of Parr and the defendant that this would be accomplished by Parr filling out the appropriate paperwork or causing such paperwork to be filled out as if the two clients of the defendant had actually submitted to testing and had successfully completed the testing when, in truth and fact and as the defendant and Parr well knew, the clients had not even appeared in Sikeston and had not successfully completed, or even attempted to complete, testing.

b. It was further part of the scheme and artifice with respect to hundreds of Redzic's clients who submitted to "short tests" from January l, 2004 through Apri! 21, 2005, that Parr would pass Redzic's clients based only on a successful "short test" rather than a valid test. However, Parr would fill out the appropriate forms and other paperwork to be transmitted to the State of Missouri representing that all of Redzic's clients had, in fact, submitted to full testing. As both Parr and Redzic well knew, the representations of the fitness of an applicant and the soundness of the testing on each and every form submitted to the State of Missouri by Parr was false

as no applicant was submitted to a full CDL test between January 2004 and April 21, 2005.

c. The representations on the appropriate paperwork completed by Parr that the clients had indeed successfully completed his testing and that the testing met the standards set forth for a comprehensive, complete test was material to the State of Missouri's decision to issue the clients CDLs which it did. Had the State known that the clients had not submitted to testing or had submitted only to a "short test," it would have not decided to issue CDLs to the clients.

C. The Mailings

19. On or about April 15, 2005 in furtherance and execution of the foregoing scheme and artifice to defraud the United States mails were utilized to transmit the aforementioned false paperwork relating to the testing and licensure of the clients from Part's facility in Sikeston, Missouri within the Eastern District of Missouri to the State of Missouri's Department of Revenue office at Jefferson City Missouri.

All in violation of Title 18, United States Code Section 1341.

COUNT FOUR (Wire Fraud)

20. The allegations set forth in paragraphs 1 through 19 are hereby incorporated by reference.

21. At some point unknown to the Grand Jury but no later than January 1, 2004 continuing through on or about April 21, 2005,

MUSTAFA REDZIC, and
TROY PARR

the defendants and others known and unknown to the Grand Jury devised a scheme and artifice to defraud the State of Missouri of money and other things of value including CDLs by means of the submission of material falsehoods and misrepresentations of material facts through wires, writings, signs and signals transmitted in and affecting interstate commerce.

22. It was part of the scheme and artifice that from time to time, Redzic would send Parr cash payments, either for the testing fees charged by the testing facility or as bribes and rewards for Parr's handling of Redzic's students.

23. On or about January 21, 2005, in furtherance and execution of the foregoing scheme and artifice to defraud, wire transmissions in and affecting interstate commerce were utilized to transmit the foregoing cash payment from Redzic to Parr.

All in violation of Title 18, United States Code Section 1343.

COUNT FIVE (FORFEITURE ALLEGATION)

24. The allegations set forth in Counts I, II, III and IV, in this Indictment are hereby repeated and re-alleged as if fully set forth herein for the purpose of alleging forfeiture to the United States pursuant to the provisions of Title 18, United States Code, Section 981(a)(1)C) and Title 28 United States Code, Section 2461.

25. The property, real and personal, of Redzic obtained, directly or indirectly, as a result of the violation of law set out in Counts I through IV of this Indictment and which was involved in such offense, or any property traceable to such property while defendant Mustafa Redzic engaged in the criminal conduct alleged in Counts I trough IV of this Indictment, is property subject to forfeiture under the provisions of Title 18, United States Code, 981(a)(1)(C) and Title 28 United States Code, Section 2461.

26. Specifically subject to forfeiture is approximately $1.8 million dollars in that such sum in the aggregate is property constituting, or derived from any proceeds the defendant obtained directly or indirectly as a result of the offense alleged in counts I and II.

27. Properties subject to forfeiture as set out in paragraph 2 above, include, but are not limited to:

(a) Twenty-Five Thousand, Two Hundred Seventy-Two Dollars and forty-eight cents ($25,272.48) seized from Mustafa Redzic on or about April 22, 2005.

28. If any of the property described in paragraphs 26 and 27 above, as a result of any act or omission of the defendant,

(a) cannot be located upon the exercise of due diligence;
(b) has been transferred to, sold to, or deposited with a third person;
(c) has been placed beyond the jurisdiction of the Court;
(d) has been substantially diminished in value; and/or
(e) has been commingled with other property that cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), which is incorporated by Title 18, United States Code Section 982(b)(l), to seek forfeiture of any other property of the defendant up to the value of the property described in paragraphs 26 and 27 above; or elsewhere, as being subject to forfeiture.

A TRUE BILL,

FOREPERSON

CATHERINE L. HANAWAY
United States Attorney

THOMAS C. ALBUS, #96250
Assistant United States Attorney

USDC-EDMO
CRIMINAL CASE COVER SHEET
INDICTMENT

Division of Filling:	**County of Offense:**	**Matter to be Sealed:**	**Type of Charge:**
SOUTHESTERN	St. Louis City and Scott County	No	Felony

FILED
Jun 21 2007
U.S. DISTRICT COURT
EASTER DISTRICT OF MO
CAPE GIRARDEAU

Defendant Information:
Defendant's Name Mustafa Redzic
Alias Name _____
Birthdate February 15, 1968 Not Available ____
Social Security No. 060-88-3571 Not Available ____
Related Case Information:
Superseding Indictment/Information? ____ Yes _X_ No
If yes, original case number: 1:07CR00110HEA (LMB)
Is this a New Defendant in the Superseding Indictment/Information? ____Yes _X_ No
Prior Complaint? ____Yes _X_ No If yes, Complaint No. ____
Complaint: ____ Pending ____ Dismissed

Defendant has had an appearance before a Magistrate?___ Yes _X_ No If yes, Magistrate name: _____
Victim-Witness Act applies: yes
Name of AUSA: Thomas C. Albus
Agency: FBI S/A Hepperna, USMS Luke Adler, USDOT-OIG Agent Corso and USPIS Inspector Voeltz

Recommended Bond/Detention: $50,000 secured
Interpreter Needed:
___ Yes Language and/or dialect _____
_X_ No
___ Not known at this time
Location Status:
Arrest Date _____
___ Currently in Federal Custody
___ Currently in State Custody Writ required___ Yes___ No
___ Currently on bond set by Court
_X_ Defendant not in custody
U.S.C. Citations and Total # of Counts against this Defendant: _1_

18:666.F/4	bribery	1	I nmt 10 yrs. F nmt $250,000 or both Sup. Rel nmt 3 yrs. $100 Special Assessment/count
18:371.F/4	Conspiracy to defraud the United States	2	I nmt 5 yrs. F nmt $250,000 or both Sup. Rel nmt 3 yrs. $100 Special

			Assessment/count
18:1341.F/4	mail fraud	3	I nmt 20 yrs. F nmt $250,000 or both Sup. Rel nmt 3 yrs. $100 Special Assessment/count
18:1344.F/4	bank fraud	4	I nmt 20 yrs. F nmt $250,000 or both Sup. Rel nmt 3 yrs. $100 Special Assessment/count

Return Date: June 21, 2007

Signature of AUSA
Thomas C. Albus

USDC-EDMO
CRIMINAL CASE COVER SHEET
INDICTMENT

Division of Filling:	**County of Offense:**	**Matter to be Sealed:**	**Type of Charge:**
SOUTHESTERN	St. Louis City and Scott County	No	Felony

FILED
Jun 21 2007
U.S. DISTRICT COURT
EASTER DISTRICT OF MO
CAPE GIRARDEAU

Defendant Information:
Defendant's Name Troy Parr
Alias Name _____
Birthdate November 27, 1955 Not Available ____
Social Security No. 589-62-3268 Not Available ____
Related Case Information:
Superseding Indictment/Information? ___ Yes _X_ No
If yes, original case number: 1:07CR00110HEA
Is this a New Defendant in the Superseding Indictment/Information? ___Yes _X_ No
Prior Complaint?___Yes _X_ No If yes, Complaint No. ____
Complaint: ____ Pending ____ Dismissed
Defendant has had an appearance before a Magistrate?___ Yes _X_ No If yes, Magistrate name: ___

Victim-Witness Act applies: yes
Name of AUSA: Thomas C. Albus
Agency: FBI S/A Hepperna, USMS Luke Adler, USDOT-OIG Agent Corso and USPIS Inspector Voeltz

Recommended Bond/Detention: $10,000 unsecured
Interpreter Needed:
___ Yes Language and/or dialect _____
_X_ No
___ Not known at this time
Location Status:
Arrest Date _____
___ Currently in Federal Custody
___ Currently in State Custody Writ required___ Yes___ No
___ Currently on bond set by Court
_X_ Defendant not in custody
U.S.C. Citations and Total # of Counts against this Defendant: 1

18:371.F/4	Conspiracy to defraud the United States	2	I nmt 5 yrs. F nmt $250,000 or both Sup. Rel nmt 3 yrs. $100 Special Assessment/count
18:1341.F/4	mail fraud	3	I nmt 20 yrs. F nmt $250,000 or both Sup. Rel nmt 3 yrs. $100 Special Assessment/count
18:1344.F/4	bank fraud	4	I nmt 20 yrs.

			F nmt $250,000 or both Sup. Rel nmt 3 yrs. $100 Special Assessment/count

Return Date: June 21, 2007

Signature of AUSA
Thomas C. Albus

UNITED STATES DISTRICIT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 1:07-CR-110 ERW
MUSTAFA REDZIC,	)	
Defendant.	)	

JURY TRIAL
VOLUME I

BEFORE THE HONORABLE E. RICHARD WEBBER UNITED STATES DISTRICT JUDGE

MARCH 31, 2008

APPEARANCES:

For Plaintiff: Catherine L. Hanaway
United States Attorney
Thomas C. Albus, AUSA
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Arthur S. Margulis, Sr., Esq.

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REPORTED BY: *Gayle D. Madden, CSR, RDR, CRR*
Official Court Reporter
United States District Court
111 South Tenth Street, Third Floor
St. Louis, MO 63102
(314) 244-7987

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... cash payments, and you'll hear Mr. Parr say that those cash payments were sometimes $100, sometimes $200, and on one occasion, it was as much as $2,500, and there's one particular day that Mr. Parr will tell you really sticks out in his mind because Mr. Redzic came down to Sikeston to pay the bribe in person, and Mr. Parr will tell you that that's February 25th, 2005, and in a minute, I'll tell you about another witness who's going to also talk about that date.

The other things that Mr. Parr received from Mr. Redzic as bribes were the promise of a job. Mr. promised Mr. Parr that he could come to work for Mr. Redzic's truck driving school. He also promised Mr. Parr that school were successful, Mr. Parr would get a share of profits.

You need to know that Mr. Parr crimes associated with this same scheme already pled guilty to those crimes.

I need to also tell you a few technical things about this case, kind of what makes it a federal case instead of a state case, and the defense agrees with this on these points. Mr. Parr was an agent of the State of Missouri. Each year covered by the indictment, the State of Missouri received more than $10,000 in federal funds, and the commercial truck driver's licenses, because they allow people to go out and make a living as a truck driver, had a value in excess of $5,000.

Now, I mentioned to you that there's going to be another witness who talks about February 5th -- 25th, 2005. That witness will be a Missouri State Highway Patrolman. He did not investigate any other part of this case, but on that night, the night that Mr. Parr will tell you Mr. Redzic came to Sikeston and paid him a bribe, this Highway Patrolmen will, tell you that he stopped Mr. Redzic northbound, so going from Sikeston back to St. Louis, that, very night and wrote him a ticket for speeding. So it puts Mr. Redzic on that highway on that night going back towards St. Louis.

You'll also hear from Dennis Crutchfield. Dennis Crutchfield also worked for CDTA. He was also a tester. He will tell you that the Defendant also offered him money and that on one occasion he took that money.

Beyond the testimony of Mr. Parr and Mr. Crutchfield, the investigators in this case will tell you that they went down and did some surveillance on the truck driving testing facility. They went down and watched the testing. They also videotaped that testing, and you're going to get to see that videotape yourselves, to see just exactly what happened as part of that testing.

You will see that three guys get into a truck and drive away, and from the timestamps on the videotape, you'll be able to tell that they're only gone about 30 minutes. This ...

UNITED STATES DISTRICIT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 1:07-CR-110 ERW
MUSTAFA REDZIC,	)	
Defendant.	)	

MOTION HEARING

BEFORE THE HONORABLE E. RICHARD WEBBER UNITED STATES DISTRICT JUDGE

APRIL 24, 2008

APPEARANCES:

For Plaintiff: Catherine L. Hanaway
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For Defendant: William S. Margulis, Esq.
Arthur S. Margulis, Sr., Esq.

Margulis Grant & Margulis, P.C.
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St. Louis, MO 63105-6677

REPORTED BY: *Gayle D. Madden, CSR, RDR, CRR*
Official Court Reporter
United States District Court
111 South Tenth Street, Third Floor
St. Louis, MO 63102
(314) 244-7987

... and this example may not be real applicable, but I don't think you can instruct a jury on possession of cocaine and then say it's okay for them to, you know, find him guilty of possession of marijuana when that was never instructed and there was no evidence of that. So I think this case was clearly about property and having a thing of value, and under the *Cleveland* case, that cannot be the subject of mail fraud or wire fraud.

THE COURT: Okay.

MR. WILLIAM MARGULIS: Thank You.

THE COURT: Thank You.

MR. ALBUS: Judge, if I could just have a couple of minutes.

THE COURT: Sure. Yeah. Mr. Margulis will get the last word if he wants it.

MR. ALBUS: That's fine. Just with respect to the kind of "now what" question, assuming that the Defendant prevails, I think I'd just ask the Court to be specific in its ruling because, you know, the issues come up with, well, let's say the determination is made that the instruction was improper. Well, if we're talking about plain instructional error on two counts, I think the remedy should be new trial on those two counts or, in the alternative, Judge, if there's a judgment of acquittal, the Government would certainly want to consider additional crimes that haven't, been charged against the Defendant, and I'd just ask the Court to be very specific

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as to the basis for the ruling because, for example, if the Court finds, well, **CDLs are not property under *Cleveland*; therefore, what the Government charged the Defendant with was not a crime, so he can't be convicted of it, well, then, we would consider** presenting additional charges to the Grand Jury, **charging the scheme to defraud the State of Missouri out of the right to honest services**. So if -- if the Court just would be specific, **I think you'd get the drift of where I'm going because we may have to consider additional charges**.

Then the final thing just with respect to the -- you know, the cocaine issue -- what we have here would be if there is a statute that says cocaine includes marijuana, well, that's where we are here, and there'd be every reason in the world why a defendant wouldn't want necessarily that instruction to the jury that broadens the definition of "cocaine." So, you know, I think Mr. Margulis' analogy is apt except that we have this additional statute that broadens the definition of "property," and because of that statute, I think the indictment, and the instructions are proper, and I thank the Court.

THE COURT: Thank You.

You do -- since it's your motion, you get to have the final word if you want it, Mr. Margulis.

MR. WILLIAM MARGULIS: No, I don't have any further argument. Thank you.

THE COURT: All right. Thank you very much. Good morning. Your arguments are helpful, and I'll be getting at it soon. Thank you.

MS. HANAWAY: Thank you, Judge.

MR. WILLIAM MARGULIS: Thank you, Judge.

(Proceedings concluded at 9:55 a.m.)

UNITED STATES DISTRICIT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Case: 08-2418
MUSTAFA REDZIC,	)	
Defendant.	)	

ORAL ARGUMENT

COURT OF APPEALS - 8th CIRCUIT

MAY 13, 2009

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... corrupted and he stopped rendering honest and faithful services to the state of Missouri in connection with the defendant or the appellant. Again I wish I had said in so many words right to honest and faithful services but I don't think anyone could credibly say after reading that indictment "I had no idea that the government was suggesting that Mr. Redzic and Mr. Parr collectively robbed the state of Missouri from the right to honest and faithful services of Mr. Parr. It was described in detail.

Judge Murphy: But what was the nature of the evidence?

Mr. Albus: The evidence: Mr. Parr testified, we heard telephone calls between Mr. Parr and Mr. Redzic, we heard testimony from Mr. Parr's colleagues and law enforcement officials that, by their agreement to submit the results of the short tests to the state of Missouri, the state of Missouri did not receive the honest and faithful services of Mr. Parr. Mr. Parr should have given longer tests, he should have given them accurate information, and with the cooperation and knowledge of the defendant, he did not do so.

Judge Murphy: Was that in the instructions: honest and faithful services?

Mr. Albus: No, it was not.

And of course, you know, that should have been in the instructions but the instructions did specifically ask the jury to find that this, and I marked it.....intentionally it alleged that defendant voluntarily and intentionally participated in the scheme to defraud which under §1346 includes the right, the scheme to defraud the state of Missouri out of the right to honest and faithful services of its

agent and it was specifically described as Troy Parr and the defendant submitted by mail to the state of Missouri false test records for CDL tests purportedly given to the defendant's students.

Judge Gibson: What, what page are you reading from?

Mr. Albus: That is page 29 of Mr. Redzic's addendum. That's instruction number 11 that was given at trial. And again, if you go down, to be fair, the phrase 'scheme to defraud' is not defined properly. If you continue on instruction 11, Judge Gibson, because it limits it to property. But I think as Mr. Arnold discussed, I think when we're talking about indictment error, or instructional error that was not raised prior to the verdict, we're talking about plain error and I think that it's fair to turn the court to the, for example the concession of Mr. Redzic's trial counsel in summation that this scheme and artifice happened.

Judge Murphy: When he claims it's not plain error because he said there was insufficient evidence to prove your case.

Mr. Albus: Well I think if we said property and we did not include things of value and we did not include any description of the corruption of Mr. Parr and **the jury had no evidence about this concept of right to honest and faithful services in the indictment or in the instructions** that would be one thing. But the truth is again while I did not describe it as I will for the rest of my career I did describe it in a common sense way of saying "Look Mr. Parr was corrupted, he did things that he was not supposed to do and the state of Missouri did not expect him to do, he did that in cooperation with the defendant. There is no question that the jury found

that that occurred and the fact that there is post verdict instructional error, I think, does not raise to the level of plain error your honor.

With respect to the bribery issues, with respect to the Zimmerman case, Mr. Arnold is a very very skilled advocate and I appreciate his advocacy for Mr. Redzic, and the great pains he's taken to explain the legislative history of the statutes and the language of title 18 section 201 but the fact of the matter is Congress could have simply re-passed section 201 to apply to officials of states and local governments and it did not do so. The language is to influence or reward and the panel in Zimmerman found that. Now I understand it's his position that if he represented Mr. Zimmerman, it wouldn't have but the law is what the law is.

Additionally the 8th circuit's pattern instruction which we relied on specifically says it includes a bribe or a gratuity, the notes to the instructions says that, so the court would have to strike down or at least create a ...

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UNITED STATES DISTRICIT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Case No. 1:07CR00110 ERW
MUSTAFA REDZIC,	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter comes before the Court on Mustafa Redzic's Amended Motion for Renewal of Motion for Judgment of Acquittal or in the Alternative New Trial [doc. #115]. The Court heard arguments on this Motion during a hearing on April 24, 2008.

I. BACKGROUND

On June 21, 2007, Defendant was charged in an indictment along with his co-defendant Troy Parr. The indictment alleged that Troy Parr was a state agent, and that while acting as a representative of Missouri, Troy Parr would submit false test reports to the State of Missouri, obtaining hundreds of commercial driving licenses for Defendant's students. The indictment specifically alleged that false test

results were mailed on April 15, 2005, and that on January 21, 2005, Defendant wired money to Troy Parr. These two acts took the form of a count of mail fraud and a count of wire fraud. Additionally, the indictment contained a bribery count alleging a pattern of payments and a specific payment on February 25, 2005 along with charging both defendants with conspiracy.

On April 2, 2008, a jury found Mustafa Redzic ("Defendant") guilty on all four counts; bribery, conspiracy, mail fraud and wire fraud. *See* 18 U.S.C. §§ 666(a)(2), 371, 1341, 1343. Following the close of the Government's evidence at trial, and again at the close of all evidence at trial, Defendant moved the Court for a judgment of acquittal pursuant to Fed. R. Crim. P. 29(b). The Court denied both of these Motions on the record. Defendant now renews his motion for acquittal pursuant to Fed. R. Crim. P. 29(b) and, alternatively, asks that the Court order a new trial pursuant to Fed. R. Crim. P. 33.

II. LEGAL STANDARD

The Federal Rules state that the Court must "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(b). This motion may be made after a trial, and if granted, a court sets aside the verdict and enters a judgment of acquittal. *See* Fed. R. Crim. P. 29(c). However, "[j]ury verdicts are not lightly overturned." *United States v. Stroh*, 176 F.3d 439, 440 (8thCir. 1999). Accordingly, such motions are to "be granted only 'if there is no interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a

reasonable doubt.'" *United States v. Cacioppo*, 460 F.3d 1012, 1021 (8th Cir. 2006) (*quoting United States v. Gomez*, 165 F.3d 650, 654 (8th Cir. 1999)). The Court is not to weigh evidence or evaluate witness credibility, and must uphold the verdict if "a reasonable-minded jury could have found [Defendant] guilty beyond a reasonable doubt." *United States v. Hayes*, 391 F.3d 958, 961 (8th Cir. 2004).

In the alternative, Defendant asks that the Court grant a new trial. The Federal Rules provide for vacating a judgment and ordering a new trial where "the interest of justice so requires." Fed. R. Crim. P. 33. However, district courts use caution in granting motions for new trials as they "are generally disfavored . . . and will be granted only where 'a serious miscarriage of justice may have occurred.'" *United States v. Rice*, 449 F.3d 887, 893 (8th Cir. 2006) (*quoting United States v. Huerta-Orozco*, 272 F.3d 561, 565 (8th Cir. 2001)).

III. DISCUSSION

In his Motion, Defendant asserts several different arguments in support of his request that the Court issue a judgment of acquittal or order a new trial. The issues Defendant raises will be considered separately.

A. PROFFER AGREEMENT DENIED DEFENDANT HIS RIGHT TO TRIAL

During the course of the investigation, Defendant and the Government entered into a

Proffer Agreement ("Agreement").[1] Based upon this Agreement, Defendant made proffered statements in which he confirms his involvement in the bribery-fraud scheme described in the indictment. The terms of the Agreement stated that the Government could only use the Defendant's statements against him in limited circumstances. One such circumstance provides for the admission of the proffered statements as impeachment or rebuttal if Defendant decides to testify "or otherwise present defense evidence."

Defendant filed a Motion in Limine seeking to have the proffered statements excluded. While the Court found that this Motion should be denied, the Court's Order became irrelevant because the Parties reached an agreement over the use of the proffered statements.[2] The Government agreed to a specific

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[1] "A 'proffer agreement' is generally understood to be an agreement between a defendant and the government in a criminal case that sets forth the terms under which the defendant will provide information to the government during an interview . . . [the agreement] is intended to protect the defendant against the use of his or her statements, particularly in those situations in which the defendant has revealed incriminating information and the proffer session does not mature into a plea agreement." Robert S. Hunter, *Federal Trial Handbook Criminal* § 31:3 (4th ed.).

[2] The Court issued a Memorandum and Order on March 21, 2008. This, Memorandum and Order sustained, in part, the Government's First Motion in Limine to Conditionally Provide for the Admission of Certain Evidence and denied, in part, Defendant's Motion to Quash Proffer Agreement and Pursuant Proffer. On March 24,2008, the Court learned of the stipulation, and entered a docket text order, stating, "[t]he parties came to an agreement relating to Government's First Motion in Limine [doc. #68] while the Court's Memorandum and Order addressing said motion was being prepared. The parties shall abide by the agreement made between the parties."

interpretation of the proffer agreement in exchange for "a number of stipulations as to the admissibility of certain evidence and as to the existence of certain jurisdictional facts." Stipulations such as this are generally enforceable, however, this agreement was not made in "open court" and for the purposes of this Memorandum and Order, the Court will consider the stipulation to have been ineffective. *See* 7 A.L.R.3d 1394.

As was discussed in the Court's original order on this issue, Defendant asserts that the admission of his proffered statements if he "otherwise present[s] defense evidence," is ambiguous, and deprived him of his rights to present a meaningful defense. The Court rejected this argument in its Memorandum and Order dated March 21, 2008, and the Court rejects this argument again today.

The Supreme Court has considered the admissibility of proffered statements, and has determined that even the "most basic rights of criminal defendants are ... subject to waiver." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). However, Mezzanatto considered whether proffer statements were admissible to rebut testimony of a defendant. Id. The Supreme Court did not consider the issue of whether a defendant can waive his rights under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410,[3] "with respect to the Government's use of plea statements in its case in chief or to rebut contradictory evidence or arguments where the defendant does not testify." *United States v. Gomez*,

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[3] Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 specifically regulate the statements made in plea negotiations. They apply to this action, since proffer agreements are the "preliminary moves in plea bargaining." 2 Federal Evidence § 4:64 (3d ed.).

210 F.Supp 2d 465,473 (S.D.N.Y. 2002). The lower courts who have considered this issue have reached different conclusions on the admissibility of proffer statements. *Compare United States v. Duffy*, 133 F.Supp 2d 213 (E.D.N.Y. 2001) *with United States v. Velez*, 354 F.3d 190 (D. Me. 2007).

Courts who have admitted proffered statements have found that a defendant's Sixth Amendment rights are not violated as they "are still able to make a meaningful defense, because they can challenge the credibility of the Government's witnesses and the weight and sufficiency of the Government's evidence." *United States v. Chen Xiang*, 2003 WL 21180400, at *2 (S.D.N.Y. May 20, 2003). These courts note that invalidating provisions of proffer agreements would "interfere with plea bargaining and cooperation efforts-in direct contravention of the criminal justice system's legitimate goal of encouraging plea bargaining in appropriate circumstances." *Velez*, 354 F.3d at 195. These courts find that the proffer agreements are enforceable as a contract where they are "entered into knowingly and voluntarily and its terms {re clear and unambiguous." *United States v. Maynard*, 232 F.Supp 2d 38, 39 (E.D.N.Y. 2002).

By divarication, courts that have refused to enforce these agreements have found that they implicate a defendant's Sixth Amendment rights. *See United States v. Duffy*, 133 F.Supp 2d 213, 216 (E.D.N.Y. 2001). The court in Duffy determined that while the agreement did "not require [defendant's] attorney to sit silently at trial, it does prevent him from making any sort of meaningful defense." *Id.* at 216. That court also found fault in the concept of proffer agreements as contractual waivers that

should be scrutinized and "construed strictly against the government" and noted the vast power disparity between the Government, and the defendant. *Id.* at 217.

The Court believes that the admissibility of proffered statements when a defendant "otherwise present[s] defense evidence" is a determination that should be made individually, and based on the specific facts of each case. This requires consideration of what each party gained, and expected to gain, from entering into the proffer agreement. A consideration of the facts of each specific case is necessary, and the Court recognizes that a blanket rule automatically allowing use of proffered statements whenever a defendant "otherwise presents[s] defense evidence," could encourage the Government's use of proffer agreements offensively to prevent defendants from being able to present a defense.

The facts presented to the Court indicate that this Agreement should be enforced as written. Defendant presents no evidence of government overreaching or abuse, and appears to have entered into the Agreement because he viewed it as being in his best interest at that time. A defendant's failure to enter into a plea bargain will not invalidate a proffer agreement, unless that defendant "can show that the government did not act in good faith, eliciting the proffer admissions without intending to work out a mutually advantageous plea deal." *United States v. Maynard*, 232 F.Supp 2d 38, 40 (E.D.N.Y. 2002).

The statement "otherwise present[ing] defense evidence" is not ambiguous and includes calling defense witnesses other than the Defendant, offering documents, and soliciting favorable evidence through

government witnesses.[4] Defendant has failed to show evidence of any government abuse in this instance, and accordingly, Defendant's proffered statements would have been admissible as impeachment or rebuttal at trial when Defendant testified or otherwise presented defense evidence.

However, the enforceability of this agreement has no bearing on the pending Motion, as Defendant was not prejudiced by the Agreement in any way during his trial. Defendant has not provided the Court with any witnesses, documents or testimony that he would have adduced but for the Agreement. Defendant has suffered no prejudice as the Government did not use the proffered statements for impeachment or rebuttal.

B. BRIBERY: 18 U.S.C. § 666(a)(2)

Defendant seeks a judgment of acquittal or new trial on the bribery count, and raises three separate theories on which he seeks relief. Defendant argues that (l) Troy Parr was not an 'agent' of the State of Missouri, (2) the subject of the bribery was

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[4] In the March 21, 2008 Memorandum and Order, the Court found that a statement is "inconsistent only if the truth of one implies the falsity of the other." *United States v. Krilich*, 159 F.3d 1020, 1025 (7th Cir. 1998). The Court determined that Defendant was pot foreclosed from arguing "that the government has not proved its case even as to elements of the case admitted by defendant . . . [and] he may attack the credibility of government witnesses and the government's other evidence as not believable or not leading to an inference of guilt beyond a reasonable doubt." Additionally, the Court found that Defendant may "contend that his admission [in his proffered statements] was wrong and that the truth is to the contrary, as shown by his own testimony at the trial or other evidence." *Id.*

not anything of value of $5,000 or more, and (3) the Government presented insufficient evidence to sustain a Conviction on the bribery count.

Defendant's first two arguments fail as Defendant expressly stipulated at trial that Troy Parr was, at all relevant times, "an agent of the state of Missouri" and that "a Commercial Drivers License is a matter worth in excess of $5,000." A defendant's decision to stipulate to a fact or element of a crime will preclude the defendant from "argu[ing] error on appeal." *United States v. Hawkins*, 215 F.3d 858 (8th Cir. 2000). Defendant agreed to this stipulation, and cannot now argue that the Government failed to demonstrate either an agency relationship or that the statutory minimum value has not been satisfied.

Defendant's argument that the Government presented insufficient evidence for the jury to find that he committed bribery in violation of 18 U.S.C. § 666(a)(2) beyond a reasonable doubt also fails. In a bribery prosecution under this statute, the Government must prove beyond a reasonable doubt that a defendant corruptly gave, offered, or agreed to give anything of value to any person, with intent to influence or reward an agent of an organization with any business, transaction, or series of transactions with a value of $5,000 or more. *See* 18 U.S.C. 666(a)(2). Specifically, Defendant asserts that the Government did not meet this burden because at the time he received the $2,500, Troy Parr was engaged in consulting work for Defendant.

In determining whether the Government presented sufficient evidence that Defendant engaged in bribery, "all reasonable inferences and credibility determinations [must be] made in support of the jury's verdict." *United States v. Kelly*, 436 F.3d

992, 996 (8th Cir. 2006). While Defendant presented evidence that the $2,500 payment might have been for the consulting work performed by Troy Parr, this evidence does not outweigh the evidence the Government presented such that a jury could not find Defendant guilty of bribery.

Through the testimony of Troy Parr, the Government presented evidence that Troy Parr received numerous other cash payments from Defendant, some of which he received before doing any work for Defendant. Troy Par testified that he never asked Defendant for payment for the consulting work because he was willing to do it just for the opportunity to work for Defendant in the future. Additionally, Troy Parr testified that the $2,500 payment did not come after the consulting work, but after Troy Parr alerted state regulators to one of Defendant's competitors. After reviewing the evidence and resolving all credibility disputes in the verdict's favor, the Court finds that a rational jury could find Defendant guilty of bribery beyond a reasonable doubt.

C. INSUFFICIENT EVIDENCE TO SUPPORT WIRE FRAUD CONVICTION

Defendant argues that the Government presented insufficient evidence for the jury to find that he committed wire fraud in violation of 18 U.S.C. § 666(a)(2) beyond a reasonable doubt. "The essential elements of wire fraud are a scheme to defraud, the use of interstate wires incident to the scheme, and an intent to cause harm." *United States v. Edelmann*, 458 F.3d 791, 812 (8th Cir.2006). Defendant specifically alleges that the Government

did not offer any evidence at trial that Defendant intentionally participated in a scheme to defraud. Defendant relies upon Troy Parr's testimony that the only wire transaction made by Defendant was a legitimate payment for services.

As the Court discussed in the previous section, when determining whether the Government presented sufficient evidence, "all reasonable inferences and credibility determinations [must be] made in support of the jury's verdict." *United States v. Kelly*, 436 F.3d 992, 996 (8th Cir. 2006). Even assuming that this particular payment was legitimate, Defendant's argument fails as a jury could still find Defendant guilty of wire fraud. The use of the wires needs only to be "incident to an essential part of the scheme." *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989). There is no requirement that "the wire communication itself have been false; even 'innocent' transmissions, i.e., 'ones that contain no false information-may supply the [transmission] element.'" (*United States v. Reifler*, 446 F.3d 65, 95 (2d 2006) (*quoting Schmuck*, 489 U.S. at 715). Even assuming that the charged wiring was innocent, it was still in furtherance of the scheme to defraud, and satisfies the "use of interstate wires incident to the scheme," element of the crime.[5] *Edelmann*, 458 F.3d at 812.

All of the essential elements of wire fraud were proved beyond a reasonable doubt. The Government presented evidence of scheme to defraud that was repeatedly executed by Defendant through Troy Parr. To effectuate this scheme, Defendant

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[5] Defendant does not dispute that the payment he wired to Troy Parr's bank account utilized interstate wires.

repeatedly requested that Troy Parr issue false documents so Defendant's students could qualify for licensure. The "intent to cause harm" element is shown by a "willful act by the Defendant with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another." *United States v. Leahy*, 464 F.3d 773, 786 (7th Cir. 2006) *(quoting United States v. Britton*, 289 F.3d 976, 981 (7th Cir. 2002)). Defendant's scheme was intended to deceive the State of Missouri for the purpose of his own financial gain, and a reasonable jury could certainly have found that this element was satisfied. *Edelmann*, 458 F.3d at 812. Defendant's claim that the Government presented insufficient evidence for the jury to find that he committed wire fraud in violation of 18 U.S.C. § 666(a)(2) fails as a rational jury could find Defendant guilty of wire fraud beyond a reasonable doubt.

D. JURY INSTRUCTION ERROR: MAIL FRAUD AND WIRE FRAUD

Defendant and his co-conspirator, Tony Parr, created a scheme to defraud the State of Missouri. Tony Parr arranged and supervised the improper testing of Defendant's students and would then submit false paperwork to the state, procuring commercial drivers licenses for Defendant's students. Defendant was charged with, and convicted of both mail fraud and wire fraud. An essential element of both of these crimes is that, "the defendant voluntarily and intentionally devised or made up a scheme to defraud [the victim] out of money, property, or property rights." *United States v.*

O'Hagan, 139 F.3d 641, 653 (8th Cir. 1998); *United States v. Rabinowitz*, 56 F.3d 932, 934 (8th Cir. 1995).

Defendant correctly asserts that the commercial drivers licenses are not property when they are in the hands of the government. *Cleveland v. United States*, 531 U.S. 12, 20 (2000). The Supreme Court has held that it is not sufficient for "the object of the fraud [to] become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." *See id.* at 20. A commercial driving license is not property in the hands of the state, even though it may be considered property in the hands of the licensee. *Id.* As a result, state and municipal licenses that are still in the hands of the state do not qualify as property for the purposes of these statutes. *Id.* at 15. Licenses, including the commercial driving licenses at question in this criminal proceeding, are "traditionally regulated by state and local authorities," and without express Congressional authority, should not be "subject to federal mail fraud prosecution."[6] *Id.* at 24-25. The commercial driving licenses at issue in this action do not satisfy the property requirement under either the wire fraud or mail fraud statutes and Defendant's conviction could not have been based upon the value of the commercial driving licenses at question.

The Government responds that Defendant's wire fraud and mail fraud convictions were not based upon the commercial driving licenses but upon Defendant depriving the State of Missouri of the honest services of Troy Parr. In 1988, Congress

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[6] This also applies to wire fraud prosecutions.

amended the definition of a "scheme or artifice to defraud" to ensure that it included "intangible rights" and specifically "the intangible right of honest services." The Government presents the Court with a valid basis for Defendant's mail and wire fraud convictions. 18 U.S.C. § 1346.

In response, Defendant asserts that the jury instructions did not define the "property" at issue to be the "intangible right of [Troy Parr's] honest services." 18 U.S.C. § 1346. Defendant's assertion is correct. The instructions that were given to the jury utilize the term "property," but do not define the term. The instruction on the wire fraud count stated that the first essential element of the crime was:

> *One*, the defendant voluntarily and intentionally participated in a scheme to defraud with knowledge of its fraudulent nature which scheme is described as follows: Troy Parr and the defendant submitted to the State of Missouri false test records for Commercial Drivers License tests purportedly given to the defendant's students

The instruction on the first element of the mail fraud count was very similar, stating:

> *One*, the defendant voluntarily and intentionally participated in a scheme to defraud with knowledge of its fraudulent nature which scheme is described as follows: Troy Parr and the defendant submitted by mail to the State of Missouri false test records for Commercial Drivers License tests purportedly given to the defendant's students

Both instructions then go on to state that:

> The phrase "scheme to defraud" includes any plan or course of action intended to deceive or

> cheat another out of property by employing material falsehoods. It also means the obtaining of property from another by means of material false representations or promises.

Neither the instruction for the count of wire fraud or mail fraud does any more to define the term "property," and neither instruction specifically states that "property" includes "the intangible right of honest services." The Model Jury Instructions provided alternate formulations. One of the alternate formulations that the Court did not select utilized the term "the intangible right to honest services." Essentially, the Court selected between two valid instructions, one which used the word "property" generically, while the other used a narrow subset of property.

Defendant did not object at trial to the jury instruction's failure to define this term, and the "failure to object or except to the giving or refusing of instructions ordinarily operates as a waiver of any defect or omission in the instructions." CJS Trial § 738. As a result, the proper standard to evaluate this error is the plain error standard. *United States v. De Rosier*, 501 F.3d 888, 898 (8th Cir. 2007) (*citing Jones v. United States*, 527 U.S. 373, 388 (1999)). "Plain error only exists if (1) there was an error, (2) the error was plain, (3) the error affected [Defendant's] substantial rights, and (4) a failure to grant relief would seriously affect the fairness, integrity, or public reputation of judicial proceedings." (*United States v. Refert*, 519 F.3d 752, 756 (8th Cir. 2008).

It is well established that a district court's failure to define certain terms will "not constitute 'error, much less plain error'" where that word "has

the meaning assigned to it in common usage, and a juror would already understand the word." *United States v. Rice*, 449 F.3d 887, 895 (8th Cir. 2006) (*quoting United States v. Smith*, 635 F.2d 716, 720 (8th Cir. 1990)). The Court finds that "property" encompassed by the wire fraud and mail fraud statutes has the meaning assigned to it in common usage, and that a juror would understand the word as it was used in the instruction. The failure to define the word "property" did not constitute error. However, even assuming that this was an error, the plain error tests were not satisfied.

The Court's instruction did not satisfy the second part of the test: that the error constitutes plain error. In this context, an error is a plain error when it is "clear" or "obvious." *Brown v. Fifth Judicial Dist. Drug Task Force*, 255 F.3d 475, 477 (8th Cir. 2001). This inquiry requires that the error be "clear under current law." *Id.* The Model Jury Instructions for these charges offered alternate formulations. One formulation included the term "property" in the instruction, while another formulation utilized the term "the intangible right to honest services." Both instructions were appropriate and fit this case. Neither instruction was incorrect. The Court selected the more generic formulation, and the selection of a generic term over a specific term is not an "error [that is] clear under current law." *Brown*, 255 F.3d at 477. The Court's instruction on the counts of mail fraud and wire fraud did not constitute plain error.

Additionally, the Court's failure to define the term "property" did not affect Defendant's substantial rights. The evidence plainly supported a finding that Defendant participated in a scheme to

defraud the State of Missouri of its intangible right to the honest services of Troy Parr. "The evidence of [Defendant's] guilt is overwhelming, and the failure to separately define ["property" as including the "intangible right to honest services"] cannot be said to have affected his substantial rights." *Rice*, 449 F.3d at 896.

Finally, the Court finds that not granting the relief Defendant seeks will not "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Refert*, 519 F.3d at 756. As described above, in selecting a jury instruction for the counts of wire fraud and mail fraud, the Model Instructions presented the Court with two options. The first option used the word "property" generically, while the other instead utilized the more specific phrase "intangible right to honest Services." The second option merely presents a narrower subset of property. Both instructions were appropriate and neither instruction was incorrect. The Court selected the more generic formulation, and the selection of a generic term over a specific term does not "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Refert*, 519 F.3d at 756. The plain error standard has not been satisfied, and Defendant is neither entitled to the acquittal he seeks, nor a new trial.

IV. CONCLUSION

Defendant has not demonstrated that there is insufficient evidence to sustain his conviction or that the interests of justice require that the Court order a new trial.

Accordingly,

IT IS HEREBY ORDERED that Mustafa Redzic's Amended Motion for Renewal of Motion for Judgment of Acquittal or in the Alternative New Trial [doc. #115] is **DENIED.**

Dated this 27th Day of May, 2008.

/s/ RICHARD WEBBER
UNITED STATES DISTRICT JUDGE